No. (1)

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

IN RE: MARY BETH USERY, DEBTOR

EWING B. GOURLEY AND CAROL L. GOURLEY,
Petitioners,

v.

MARY BETH USERY, STEVEN USERY, AND MARK GARDNER,
Respondents

MARY BETH USERY; STEVEN USERY; MARK GARDNER; TRUSTEE OF THE SHAWN USERY TRUST; WILLIAM HART, TRUSTEE UNDER CERTAIN DEEDS OF TRUST;

v.

EWING B. GOURLEY; CAROL L. GOURLEY; E.B.G. HEALTH CARE III, INC.; E.B.G. HEALTH CARE IV, INC.; HEALTH CARE RETIREMENT VILLAGE, INC.; HEALTH CARE LAUNDRY SERVICES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must the bankruptcy court follow the law of the case doctrine when deciding the sole issue of damages on remand from the Court of Appeals?

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PETITION FOR WRIT OF CERTIORARI

Ewing B. Gourley and Carol L. Gourley petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

CORPORATE DISCLOSURE STATEMENT

The following Petitioners are corporations: E.B.G. Health Care III, Inc.; E.B.G. Health Care IV, Inc.; Health Care Retirement Village, Inc.; and Health Care Laundry Services, Inc.. None of the Petitioner-corporations have parent corporations and no publicly held companies own 10 percent or more of the stock of any of the Petitioner-corporations.

OPINIONS BELOW

The ruling of the United States Bankruptcy Court for the Western District of Missouri (Judgment 1) is unreported. The ruling of the United States District Court for the Western District of Missouri affirming Judgment 1 is unreported. The first ruling of the United States Court of Appeals for the Eighth Circuit reversing and remanding as to damages is reported at 123 F.3d 1089 (8th Cir. 1997). The second ruling of the United States Bankruptcy Court for the Western District of Missouri (Judgment 2) is unreported. The order of the United States Bankruptcy Court for the Western District of Missouri granting the Userys a new trial as to damages only is unreported. The third ruling of the United States Bankruptcy Court for the Western District of Missouri (Judgment 3) is unreported. The ruling of the United States Bankruptcy Appellate Panel for the Eighth Circuit is reported at 242 B.R. 450 (B.A.P. 8th Cir. 1999). The second ruling of the United States Court of

Appeals for the Eighth Circuit is unreported. The ruling of the United States Court of Appeals for the Eighth Circuit denying Petitioners' Motion for Rehearing is unreported. The decisions are reprinted in Appendices A-I, *infra*.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on November 22, 2000. The Court of Appeals entered its Order Denying Petitioners' Motion for Rehearing on January 16, 2001. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On May 1, 1989, Petitioners, Ewing Gourley and Carol Gourley ("Gourleys"), purchased two nursing homes known as Northside Nursing Center ("Northside") and Ozark Nursing and Care Center ("Ozark") from Central Health Care Centers, Inc., which was owned by Respondents, Mary Beth Usery, her then-husband Steve Usery, and a trust for the benefit of their children ("Userys").[1] The terms of the transaction provided that the Gourleys would pay a total of $ 8 million for the business. The Gourleys agreed to assume debts of the business totaling $ 4,158,986.74 and signed a promissory note in favor of the Userys for the remaining portion of the purchase price ($ 3,841,013.26). Pet.App. G. (A-139)

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[1] As reflected on the title page, the Gourleys own several businesses and the Userys have several trusts and trustees, all of which are parties to this matter. For the sake of simplicity, Petitioners will refer to the parties collectively as the "Userys" and the "Gourleys."

The Gourleys agreed to the purchase on the representation that the cash flow for the 15 month period that included 1987, after service of existing debt, was approximately $ 1.2 million, or $ 960,000 annually. The Userys further represented that, although complete financial records were not yet available, cash flow in 1988 was substantially the same as 1987. The Gourleys determined, based on these representations, that the cash flow would be sufficient to pay the current expenses, the assumed liabilities, and the promissory note, while still allowing them to earn a profit. Pet.App. G. (A-140)

Due to cash flow problems with the business, the Gourleys stopped making full payments on the promissory note. Because Mary Beth Usery depended on the income from the promissory note, she filed a Chapter 11 bankruptcy case on February 17, 1992. The Gourleys, claiming that the Userys had defrauded them in the sale of the business, filed an adversary proceeding to cancel the promissory note and determine the dischargeability of damages arising out of the fraud. Pet.App. G. (A-140)

The Userys also filed an adversary proceeding seeking a judgment against the Gourleys in the amount of the promissory note. The two adversary proceedings eventually were joined and tried before the Hon. Karen M. See of the United States Bankruptcy Court for Western District of Missouri. Pet.App. G. (A-140)

At the end of the trial Judge See found that the Userys had committed fraud in connection with the sale of the business. She found, in relevant part, that the Userys had misrepresented the business's cash flow in 1988 as being substantially the same as the cash flow in 1987 when, in fact, it was significantly lower. Judge See

ordered entry of judgment for the Gourleys. In her written opinion, she found that damages actually totaled $ 5,470,775.57. Benefit of the bargain damages, which Judge See defined as the difference between the actual value of the business and the price paid, totaled $ 2,697,000.26. In reaching this sum, she specifically adopted the valuation of the business by Gourleys' expert, who concluded that the actual value was $ 5,175,000.00, based on the average cash flow for 1985, 1986, and 1988 divided by a capitalization rate of 16.9% for Ozark and 18.7% for Northside. She also agreed with the Gourleys' expert that the cash flow for 1987 should not be included in the calculation because that year was atypical. After the damages were set off against the promissory note, judgment was entered in favor of the Gourleys in the amount of $ 1,629,762.31 ("Judgment 1"). Pet.App. G. (A-141)

The Userys appealed Judge See's decision to the United States District Court for the Western District of Missouri, which affirmed. The Userys then appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed as to the liability of the Userys for the fraudulent misrepresentation as to the value of the nursing homes, but found several errors with respect to the damages. Specifically, the Court found that the bankruptcy court used an improper formula for calculating benefit of the bargain damages. Instead of the difference between the *price paid* and the actual value, the Eighth Circuit concluded that the proper measure of damages was the difference between the *value of the business had it been as represented* and the actual value. The Court remanded the case for a new trial on the issue of damages. The instructions specifically provided:

> We are satisfied that the Bankruptcy Court's findings of fact on the issue of liability are not clearly erroneous, and we have no quarrel with the court's legal conclusions on this issue.
>
> . . .
>
> On remand, the Bankruptcy Court must determine the difference between the actual value of the nursing homes and the value of the homes *as represented*, using the same capitalization rate for each part of the equation. In other words, the court must use the same process to calculate both valuation figures, changing only the cash-flow numbers.
>
> Pet.App. C (A-86) (emphasis added).
>
> In its conclusion the Court further stated:
>
> Because of several errors in the calculation of damages, a new trial limited to the issue of damages is required. The judgment of the District Court is affirmed as to liability and reversed as to damages, and the case is remanded with instructions to remand to the Bankruptcy Court for further proceedings in accordance with the opinion.
>
> Pet.App. C. (A-93)

On remand, Judge See entered an order recalculating the damages without conducting a new trial ("Judgment 2"). In this order, Judge See concluded that the value of the business as represented was $ 8.2 million, and the actual value was $ 5,919,983.00. Thus, she found benefit of the bargain damages totaled $ 2,280,017.00. After adding other damages that are not at issue, Judge See set off the sum against the promissory note. Because the outstanding amount of the prom-

issory note exceeded the total damages, Judge See ordered entry of judgment in favor of the Userys in the amount of $ 462,746.13. Pet.App. G. (A-142)

After Judge See left the bench, the case was transferred to Hon. Arthur B. Federman, and the Userys moved for a new trial on the issue of damages. Judge Federman granted the motion because no retrial had been held, which he found violated the Eighth Circuit's instructions on remand. In Judge Federman's pre-trial order, the court stated:

> Based on the holding of the Eighth Circuit, the matters to be decided at the new trial have been carefully circumscribed. In the interest of fairness and judicial economy, this Court does not intend to admit evidence as to the factual findings previously made by Judge See and not disturbed on appeal.
>
> . . .
>
> Accordingly, the Court will allow evidence as to the following elements of damages:
>
> 1. Expert testimony as to the appropriate capitalization rate to be applied both to the represented cash flow figure for 1987, in the amount of $960,000.00, and the actual cash flow figures;
>
> Pet.App. E. (A-113)

The second trial was held on May 6, 1999. Each side called an expert witness to testify as to both the actual and represented value of the business. The Gourleys' expert calculated the represented value by using the cash flow figure of $960,000 and a capitalization rate of fourteen percent, as directed by Judge Federman's pre-trial order and the Eighth Circuit's mandate. Pet.App. G. (A-143)

The Userys called an MAI appraiser who specialized in appraising nursing homes. He figured the actual and represented value based on the average cash flow of the two nursing homes for 1985 through 1988. He weighted the figures to account for external circumstances for each year and determined the value based upon a capitalization rate of fifteen percent. This expert concluded that the Gourleys suffered benefit of the bargain damages in the amount of $ 390,854.87. Pet.App. G. (A-144)

The bankruptcy court adopted the Userys' figures and then added the $390,854.87 in benefit of the bargain damages to other damages totaling $302,249.15 that the parties do not dispute. Thus, the damages totaled $693,104.02. The court determined that this amount should be offset against the outstanding amount of the promissory note, which resulted in a judgment in favor of the Userys ("Judgment 3"). The bankruptcy court further found that the Userys were entitled to interest on the judgment pursuant to the original terms of the promissory note, less the amount of the damages and any payments previously made. The court did not specifically calculate the final amount of the judgment. Pet.App. G. (A-146)

The Gourleys appealed Judgment 3 to the Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals ("BAP") and, on December 18, 1999, the BAP affirmed the judgment. The BAP rejected the Gourleys' claims that the bankruptcy court exceeded its authority on remand in violation of the law of the case doctrine and that the bankruptcy court calculated damages incorrectly. Pet.App. G. (A-146) The Gourleys then appealed to the Eighth Circuit, which affirmed the BAP's decision without an opinion on November 22, 2000. Pet.App. H

(A-156). The Eighth Circuit denied Petitioners' Motion for Rehearing on January 16, 2001. Pet.App. I. (A-157)

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's opinion affirming the bankruptcy court's decision conflicts with the established caselaw concerning the law of the case doctrine.

The law of the case doctrine prevents relitigation of a settled issue in a case and requires that courts follow decisions made in earlier proceedings to insure uniformity of decisions, protect the expectations of the parties and promote judicial economy. *Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 784 (8th Cir. 1996); *Christianson v. Colt Industries Operating Group*, 486 U.S. 800, 817, 100 L.Ed.2d 811, 108 S.Ct. 2166 (1988); *Messenger v. Anderson*, 225 U.S. 436, 444, 56 L.Ed. 1152, 32 S.Ct. 739 (1912). When a case has been decided by the Eighth Circuit and remanded to the district court, every question which was before the Eighth Circuit and disposed of by its decree is finally settled and determined. *Klein v. Arkoma Prod.Co.*, 73 F.3d at 784. The district court is bound by the decree and must carry it into execution, or give any further or other relief required. *Id.*

The Eighth Circuit remanded the case to the Bankruptcy Court with explicit directions to "determine the difference between the actual value of the nursing homes and the value of the homes *as represented*, using the same capitalization rate for each part of the question." Pet.App. C (A-86) (emphasis added). The value of the homes was represented to the Gourleys based on the cash flow in 1987—$960,000. The Eighth Circuit, in its first opinion, expressly found that the Userys represented to the Gourleys that the cash flow for 1988 was

similar to that in 1987—$960,000—when in fact it was a substantially lower figure. Pet.App. C. (A-78)

The Bankruptcy Court, through Judge Federman, then ordered a new trial, the sole issue being damages, with the proviso that "[i]n the interest of fairness and judicial economy, this Court does not intend to admit evidence as to the factual findings previously made by Judge See and not disturbed on appeal." Pet.App. E. (A-112) It is uncontested that Judge See used the cash flow figure of $960,000 to determine damages and that her use of $960,000 was not disturbed on appeal.

Therefore, by the clear and unambiguous language of the Eighth Circuit's mandate, the Bankruptcy Court should have calculated the value using the cash flow figure of $960,000—the same figure that the Userys falsely "represented" to the Gourleys. However, the Bankruptcy Court did not use the figure of $960,000, but instead used a series of cash flow figures from various years which were never represented to the Gourleys, in direct violation of the Eighth Circuit's mandate that "the value of the homes as represented" should be used. Pet.App. F. (A-116) By using figures other than $960,000, Judge Federman violated the law of the case doctrine, the result being that Judge Federman arrived at a damages figure dramatically lower than that determined by Judge See.[2]

The Eighth Circuit's opinion affirming Judge Federman's decision runs counter to the established caselaw ad-

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[2] Judge See initially ruled that the Gourleys had been damaged in the amount of $5,470,775.57. Judge See then revised her damages figure to $2,581,752.40. Judge Federman subsequently ordered a new trial and further reduced the Gourleys' damages to the $693,104.02.

dressing the law of the case doctrine and flies in the face of the spirit of the doctrine— to insure uniformity of decisions, protect the expectations of the parties and promote judicial economy. *See Klein v. Arkoma Prod. Co.*, 73 F.3d at 784. Allowing the Court of Appeal's decision to stand will erode the doctrine and have far-reaching consequences.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES, BANKRUPTCY COURT
For the Western District of Missouri
EWING B. GOURLEY AND CAROL L. GOURLEY
Plaintiff
v.
MARY BETH USERY, STEVEN USERY AND MARK GARDNER, TRUSTEE
Defendant

MARY BETH USERY, STEVEN USERY, JAMES MCLEOD, Trustee of the Shawn Usery Trust and the Stephanie Usery Trust and WILLIAM HART, Trustee Under Certain Deeds of Trust,
Plaintiffs
v.
EWING B. GOURLEY, CAROL I. GOURLEY, E.B.G. HEALTHCARE III, INC., E.B.G. HEALTHCARE IV, INC. HEALTHCARE RETIREMENT VILLAGE, INC. AND HEALTHCARE LAUNDRY SERVICES, INC.,
Defendants

Case No. 92-60255-KMS
Adv. No. 92-6034-KMS
Adv. No. 92-6038-ICMS

JUDGMENT

[X] This proceeding having come on for trial or hearing before the court, the Honorable KAREN M. SEE, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

IT IS ORDERED AND ADJUDGED: as follows:

1. In Adversary No. 92-6038, judgment is entered in favor of the defendants Ewing B. Gourley, Carol L. Gourley, E.B.G. Healthcare III, Inc., E.B.G. Healthcare IV, Inc., Healthcare Retirement Village, Inc. and Healthcare Laundry Services, Inc., and against plaintiffs Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, Steven Usery, James McLeod, Trustee of the Shawn Usery Trust and the Stephanie Usery Trust, and William Hart, Trustee Under Certain Deeds of Trust.

2. In Adversary No. 92-6034 defendant Mark Gardner is dismissed.

3. In Adversary No. 92-6034, judgment is entered in favor of plaintiffs Ewing Gourley, Carol Gourley and the companies, and against defendants Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, and Steven N. Usery, as stated below. In Adversary No. 92-6038, judgment is entered in favor of defendants Gourley and against plaintiffs Mary Beth Usery, her bankruptcy estate and Steven N. Usery, as stated below.

A. Judgment is entered for damages in the total amount of $5,470,775.57.

B. The damages shall be reduced by a set-off of $3,841,013.26 as payment in full and satisfaction of the promissory note, executed by plaintiffs Gourley pursuant to the contract for purchase of assets in 1989. After the set-off, the balance of damages shall remain as a money judgment.

C. All defendants in Adversary No. 92-6034 and all plaintiffs in Adversary No. 92-6038 are ordered to deliver to the Gourleys the note, marked "paid", and

to release all deeds of trust, mortgages, liens or other security interests on property of the plaintiffs in Adversary No. 92-6034 and the defendants in Adversary No. 92-6038, all within 10 days of the date of entry of this judgment. If the Userys and the other plaintiffs in Adversary No. 92-6038 fail or refuse to deliver the note and release all security interests within 10 days, as directed herein, then this judgment may be recorded where appropriate and shall be deemed a satisfaction of the note and a release of all deeds of trust, mortgages, other security interests or liens as described herein.

D. The damages in the amount of $5,470,775.57 shall accrue interest at the federal statutory rate from the date of entry of this judgment until the note is marked as paid and returned to the makers aid and the deeds of trust, mortgages, other security interests or liens described herein are released, or the note and security instruments are deemed satisfied and released by recording of this judgment.

E. After the set-off has been effectuated by satisfaction of the note and release of the security instruments as described herein, the balance of the damages shall accrue interest at the federal statutory rate.

F. A judgment for costs is entered against defendants Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, and Steven Usery in Adversary No. 92-6034, and against plaintiffs Mary Beth Usery, Steven Usery and the Shawn Usery Trust and the Stephanie Usery Trust, but not against Trustee James McLeod personally, in Ad-

versary No. 92-6038. Since-the trials in the two adversary proceedings were consolidated, and the issues were the same in each case, the costs are not allocated to either case, but may be satisfied in either case from any of the parties named herein.

4. Pursuant to 11 U.S.C. § 523(a)(2)(B), the judgment against debtor Mary Beth Usery shall not be discharged in the bankruptcy proceeding.

ROBERT F. CONNOR
Clerk of Bankruptcy Court
by /s/ Jamie I. Hinkle Deputy Clerk

Seal of the Bankruptcy Court

Date of issuance: 4/14/95

Mark Gardner
Mark Powell
Fred C. Moon
Devon Sherwood
UST
James Doran

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

IN RE: MARY BETH USERY,
Debtor.

EWING B. GOURLEY and CAROL L. GOURLEY,
Plaintiffs,
vs.
MARY BETH USERY, STEVEN USERY and
MARK GARDNER, Trustee,
Defendants.

MARY BETH USERY, STEVEN USERY,
JAMES McLEOD, Trustee of the Shawn Usery Trust
and the Stephanie Usery Trust and WILLIAM HART,
Trustee Under Certain Deeds of Trust,
Plaintiffs,
vs.
EWING B. GOURLEY, CAROL L. GOURLEY, E.B.G.
HEALTHCARE III, INC., E.B.G. HEALTHCARE IV,
INC., HEALTHCARE RETIREMENT VILLAGE,
INC. and HEALTHCARE LAUNDRY SERVICES,
INC.,
Defendants.

Bankruptcy No. 92-60255
Adversary No. 92-6034
Adversary No. 92-6038

ORDER DENYING AS MOOT USERY MOTION TO COMPEL PAYMENT PENDING JUDGMENT AND GOURLEY APPLICATION FOR ORDER REQUIRING SUBORDINATION OF LIENS AND INTEREST

The motion filed by the parties Usery to compel payment on a promissory note pending issuance of judgment is denied for the reason that the judgment entered the same date as this order awards damages to the Gourleys in an amount exceeding the balance on the promissory note. After setting off the note pursuant to the judgment, the note has been satisfied and no payments are due.

The application filed by the Gourley parties for an order requiring subordination of liens and interest is denied as moot because the judgment entered this date renders the promissory note signed by the Gourleys paid in full. Thus, the Usery parties are directed in the judgment to release all mortgages, deeds of trust, liens and other security interests, so there is no lien or interest to subordinate.

IT IS SO ORDERED.

/s/ Karen M. See
Karen M. See, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

IN RE: MARY BETH USERY,
Debtor.

EWING B. GOURLEY and CAROL L. GOURLEY,
Plaintiffs,
vs.
MARY BETH USERY, STEVEN USERY and MARK GARDNER, Trustee,
Defendants.

MARY BETH USERY, STEVEN USERY, JAMES McLEOD, Trustee of the Shawn Usery Trust and the Stephanie Usery Trust and WILLIAM HART, Trustee Under Certain Deeds of Trust,
Plaintiffs,
vs.
EWING B. GOURLEY, CAROL L. GOURLEY, E.B.G. HEALTHCARE III, INC., E.B.G. HEALTHCARE IV, INC., HEALTHCARE RETIREMENT VILLAGE, INC. and HEALTHCARE LAUNDRY SERVICES, INC.,
Defendants.

Bankruptcy No. 92-60255
Adversary No. 92-6034
Adversary No. 92-6038

MEMORANDUM OPINION

I. INTRODUCTION

These adversary actions arose from a sale of nursing homes as a result of sellers' alleged fraudulent misrepresentations. The buyers filed the first action; the sellers filed the second one. Claims and counterclaims in both are essentially the same. Trial was January 19 through February 8, 1993. Judgment is entered for the buyers, the Gourleys and their companies, and against the sellers, debtor Mary Beth Usery, Steve Usery, and parties aligned with them. As stipulated, the court has jurisdiction over these consolidated core proceedings and may enter final orders pursuant to 28 U.S.C. §§ 1334(b) and 157(b) (2) (B),(C),(I), and (0) . The complaints of intervenors Steve Usery and Trustee James McLeod also alleged jurisdiction under §§ 1334 and 157.

These findings and conclusions are consistent with those made on the record at the end of trial, but due to additional review of the voluminous record, they may modify oral findings. Any findings of fact designated in error as conclusions of law shall be deemed findings of fact; any conclusions of law designated in error as findings of fact shall be deemed conclusions of law.

II. OUTLINE OF FACTS, PARTIES AND WITNESSES

Detailed findings of fact are stated later, but basic facts are outlined below. A list of major characters is also provided.

A. Fact outline

1. In early 1989, Ewing Gourley negotiated with the Userys to lease or buy a nursing home business from Central Health Care Centers, Inc. (CHCC), a corporation owned by the Userys.

2. In April, the Gourleys signed a contract to buy CHCC's assets, with seller-financing by the Userys; the sale closed in May 1989. The price was $8,000,000, less credit for assumption of long-term debt and payables, for a balance of about $4,000,000. The assets were two nursing homes, a laundry, and retirement apartments.

3. After the purchase, the Gourleys concluded the Userys had misrepresented facts about the business, including cash flow, payables, and that all assumed debts were business-related.

4. The Gourleys tried unsuccessfully to negotiate new payment terms; eventually they ceased payments because they could not make payments and meet operational expenses.

5. In February 1992, Mary Beth Usery filed a Chapter 11 case. The Gourleys filed Adversary No. 92-6034 against the Userys, alleging fraudulent misrepresentations in the sale and seeking damages, cancellation of the note, and retention of the assets. The complaint's title was "Complaint to Determine Dischargeability of Debt." Steve Usery counterclaimed for $4,000,000 due on the note.

6. Soon after, Mary Beth filed a countersuit, No. 92-6038, seeking $4,000,000, the same as Steve's counterclaim in the first case. The cases were consolidated. Mr. McLeod, Trustee of the children's trusts, and Steve intervened as plaintiffs and amended the

complaint to request foreclosure on deeds of trust. The Gourleys counterclaimed, restating their fraud claim from the first case and alleging the Trustee, in privity with the Userys, was bound by their fraud.

B. Witnesses for the Userys

1. Mary Beth Usery originally owned 100% of the stock of Central Health Care Centers, Inc. (CHCC) . It was a gift from her mother. At the time of the asset sale she owned 51%; she had transferred 49% to her husband and the children's trusts. Mary Beth filed a Chapter 11 case in February 1992. After this trial it was converted to Chapter 7 in February 1993.

2. Steve Usery, Mary Beth's husband, was CHCC's president, a director, and shareholder. He also owned other companies: Stesery, Inc., A company formed to manage CHCC and the nursing homes; Hixson Drugs, which sold drugs to the homes; and Stephanie's, Inc., a convenience store company. At the time of sale Steve and Mary Beth were in divorce proceedings; at the time of bankruptcy, they were divorced.

3. Linda Parsons was CHCC's controller and accountant. The court finds she participated in the Userys' fraudulent representations and past irregularities at CHCC, such as keeping false records and submitting false reports and tax returns.

4. Judy Breeding specializes in nursing home accounting. She was the accountant for the Userys, CHCC and other businesses. She was the Userys' close friend. She joined CHCC's board before negotiations and attended all significant meetings between Mr. Gourley and the Userys which culminated in the sale agreement. She

also had performed services for Gourley. The court finds Breeding had to know that representations made in her presence or by her were false, and she assisted the Userys in past irregularities such as adjusting books and filing false reports and erroneous tax returns.

5. William Hart, a lawyer, represented CHCC and the Userys in drafting the agreement and after the sale when disputes arose. Hart was trustee under deeds of trust executed as part of the sale. He represented Mary Beth individually after the sale.

6. James McLeod, a lawyer, is Trustee of two trusts for the Userys' children that owned CHCC stock at the time of sale. There is no alleged wrongdoing by McLeod. He intervened because the Trustee's interest was "not adequately represented by the other parties."

7. Mark Gardner, counsel for Mary Beth Usery, was named in error in the Gourley action as trustee of a liquidating trust. He was dismissed. In effect, Mr. McLeod took his place as trustee of the children's trusts.
8. Bob Scott was the Userys' expert on valuation of the nursing home business.

C. Witnesses for the Gourleys

1. Ewing and Carol Gourley purchased CHCC's assets from the Userys. The Gourleys own the co-defendant companies in Adversary No. 92-6038, through which they operate.

2. Devon Sherwood, the Gourleys' trial counsel, also represented them at meetings with the Userys, Ms. Breeding and Mr. Hart after disputes arose.

3. R.L. Harrison (deceased) , an MAI appraiser, had appraised the business for the Userys. In April 1989 he

updated the earlier work for the Gourleys' Landmark Bank application. He relied on figures provided to him by the Userys, the same ones the Gourleys contend are fraudulent misrepresentations. 4. Anthony Lynn was the Gourleys' expert on valuation.

III. PROCEDURAL BACKGROUND

A. Actions Filed and Consolidated

On February 17, 1992, Mary Beth Usery filed a Chapter 11 case. It was converted to Chapter 7 in February 1993 after this trial. Steve Usery, now divorced from Mary Beth, is not in bankruptcy. On April 30, 1992, the Gourleys filed Adversary No. 92-6034 (the Gourley action) against Mary Beth and Steve Usery, lawyer Mark Gardner as trustee of a liquidating trust, and the two children, Shawn and Stephanie, because they had been shareholders and beneficiaries of the liquidating trust. The Gourleys alleged fraudulent misrepresentations by Mary Beth and Steve in the sale of CHCC's assets, and requested damages, cancellation of the note, and retention of the property. The complaint was titled "Complaint to Determine Dischargeability of Debt."

On May 13, 1992, Mary Beth, then a debtor in possession, filed a separate action, Adversary No. 92-6038, against the Gourleys and the businesses through which they operated the nursing homes (the Usery action). She sought $4,000,000 as the balance on the note the Gourleys gave the Userys. Mary Beth's action could have been filed as a counterclaim in the Gourley action. On June 8, 1992, she filed her answer in the Gourley action. Steve filed an answer with a $4,000,000 counterclaim for payment of the Gourley note, the same relief Mary Beth requested in her action. When Mary Beth's countersuit

was filed, the two actions were consolidated for pretrial proceedings and trial. The parties consented to try the cases together because the issues and evidence were the same.

In the Gourley action, it was discovered that Mark Gardner had been named as a party in error. An Usery attorney had advised a Gourley attorney that after the sale CHCC was dissolved and payments to shareholders were made through a liquidating trust of which Gardner was trustee. At the time of the actions there was no liquidating trust, so it was agreed Gardner would be dismissed.

In the second action, Steve Usery and James McLeod, Trustee of the two children's trusts, intervened to be plaintiffs with Mary Beth. They amended the complaint, adding a count to foreclose on deeds of trust on the nursing homes that were security for the Gourleys' note, in addition to the original count for $4,000,000. The Gourleys counterclaimed, restating the fraud claim from their action and alleging that Trustee McLeod was a party in privity with the Userys and bound by their fraud.

B. Personal Jurisdiction Over Trustee of Children's Trusts

In the Gourley action, Trustee McLeod was served with a complaint on June 10, 1992, although his name was not substituted on the caption for the erroneously-named Mark Gardner. A green "return receipt" card signed on June 11 by someone in his firm is in the court file, indicating mail service pursuant to Bankruptcy Rules. A certificate of service, filed June 17, 1992 by plaintiffs Gourley, states McLeod was served on June 11, 1992. At the same time, McLeod was intervening as

a plaintiff in the Usery case, which was consolidated with the Gourley case. Thereafter, he participated in the Usery action and the consolidated proceeding. He filed many pleadings as Trustee.

In the Gourley case, McLeod never filed a pretrial objection to personal jurisdiction. He participated in the consolidation cases in pretrial and trial stages, including filing pleadings in the Gourley case. He apparently did not file an answer in the Gourley case, but on November 27, 1992, Mcleod filed a request for affirmative relief in the Gourley case by a Motion to Compel Payment or in the Alternative for Permission to Foreclose (File Doc. 37). McLeod commenced trial without objecting to personal jurisdiction. The court and parties assumed he was implicitly substituted for Mark Gardner, named in error as a trustee.

Trustee McLeod first objected to personal jurisdiction in a Motion for Judgment at the Close of Plaintiff Gourleys' Evidence. He argued he was not named as a defendant in the Gourley complaint and was never served with process. The court files show he was served on June 10, 1992. While it is true he was not named in No. 92-6034 as a defendant, another lawyer was listed in error and it appears all attorneys assumed he was substituted as the correct trustee (as indicated by the service made on him on June 10, 1992). This is consistent with his affirmative steps to intervene as a plaintiff in the other action in the consolidated cases, his active participation in the actions at every stage, and his pleadings in the Gourley action, including the affirmative relief sought in the motion to compel payment. Counsels' comments at trial also indicate everyone agreed to try all issues, because the relief sought by the parties in each case was the same.

McLeod also contended a fiduciary representative had not been appointed for the children. However, he is the fiduciary representative of the trusts, not the children. He failed to consider the children's status as a hindrance to his appearance as a plaintiff in the Usery action. In fact, McLeod's firm filed pleadings in the Usery case as counsel for the children. Although the children were named defendants in the Gourley action, along with the liquidating trustee, in both actions only the Trustee participated.

The defense of lack of personal jurisdiction may be waived "if it is neither raised by motion before the answer or asserted in a responsive pleading." *Network Professionals, Inc. v. Network Internat'l, Ltd.*, 146 F.R.D. 179, 181 [1] (D. Minn. 1993) ; *see also* Bankruptcy Rule 7012 (b) The defense also may be "lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.". *Yeldell v. Tutt,* 913 F.2d 533, 539 (8th Cir. 1990) (quoting *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939)). In **Yeldell**, *Id.* , defendants "provided no more than a bald assertion in their answer that the court lacked personal jurisdiction over them. They then participated in discovery, filed various motions [and]... participated in a five-day trial. . . all without raising the issue of personal jurisdiction or requesting a ruling on it."

The belated claim of lack of personal jurisdiction is without merit. McLeod consented to personal jurisdiction or waived any objection, both in the separate actions and in the consolidation. His objection after plaintiffs rested was not timely asserted. In the Usery case, he voluntarily submitted to jurisdiction by intervening, and the claims and requests for relief in both cases were the same. The only difference was the de-

nomination of parties as plaintiffs or defendants. In addition, he filed pleadings in the Gourley action, including a motion for affirmative relief, before asserting the objection. Mr. McLeod's conduct manifests an intent to submit to jurisdiction in both cases.

IV. FACTS

This was a long trial with over a dozen volumes of exhibits. It is impossible to itemize all the evidence. The trial record contains much more evidence in the same vein.

A. To November 1988

As described by the Gourley counsel at trial, this is the case of a couple with insatiable desires for money who killed the golden goose. Debtor Mary Beth Usery was 34 at the time of trial. When Mary Beth was seven, her mother gave her, in trust, Central Health Care Centers, Inc., a multi-million dollar business. Legal title vested at 21. At 19 Mary Beth married Steve, her second husband, who was in his early twenties. Before the marriage, Steve's primary work experience had been a short stint as a car salesman. At CHCC, Steve went from maintenance to management in one year. When Steve turned 25, Mary Beth made him president.

Steve and Mary Beth have three children. Mary Beth has not worked for CHCC since Stephanie was born in 1981, when Mary Beth was 23. Originally, Mary Beth owned 100% of CHCC's stock, but she gave 24% to Steve and 12.5% each to trusts for Shawn and Stephanie. At the time of sale, she owned 51%.

Mary Beth and Steve had an insatiable desire to live affluently. According to Steve, at age 30 Mary Beth decided they should retire. Mary Beth had always dis-

liked the nursing homes' atmosphere, but loved the affluent lifestyle provided by the business. From the time the Userys took over active management when she was 21, they treated the business as a private reserve with no restrictions on money they could take out. Cash withdrawals averaged almost $1,000,000 per year the last three years and eight months of the business, excluding personal expenses, salaries, and distributions of profit to shareholders.

Steve and Mary Beth were each paid salaries by CHCC. Steve received $75,000 per year, and in many years got $100,000 bonuses. Mary Beth received $50,000, although she had not worked in the business since 1981. The Missouri Division of Aging supervises Medicaid homes. It limits salaries that can be paid and permits salaries only for persons who actually work in the business. Even though Mary Beth had not done any work for the company since 1981, she was listed in Medicaid documents as head of accounting in order to justify her salary. Mary Beth was listed as head of accounting with the assistance of CPA Judy Breeding, even though Breeding knew Mary Beth did no work for the company and that the Division approved salaries only for real employees. Breeding and the Userys knew this was a misrepresentation to the Division. Breeding, a close friend, was also the accountant for CHCC and the Userys.

As shareholders, the Userys received distributions of profits from CHCC and Stesery, Inc., a company described below. The Userys also withdrew substantial sums from CHCC as loans to shareholders. By 1983 they had already withdrawn over $200,000 as loans in addition to profits, salaries and bonuses. Every year more money was taken out of the company as loans to share-

holders and related parties. The improper loans to shareholders were never repaid. After the CHCC assets were sold, the IRS demanded payment of several hundred thousand dollars in taxes, penalties and interest because the loans, in excess of $1,000,000, should have been characterized as taxable income to the Userys.

Initially, Steve managed the nursing homes as an employee, officer and director of CHCC, but with Mary Beth's approval, he formed a separate company, Stesery, Inc., to manage the homes for a charge of 7% of gross revenues. Stesery, Inc. paid Steve a salary, but he also continued to pay himself a CHCC salary, even though his management duties were supposedly performed through Stesery, Inc. Stesery received substantial loans from CHCC that were never repaid. Although "distributions of profit" to shareholders were made by Stesery, Inc., Stesery's loans from CHCC were ultimately written off as bad debts.

Steve also wanted a separate, non-nursing home business of his own, so he formed Stephanie's, Inc. to build and operate convenience stores. In 1986, Stephanie's began borrowing from CHCC. Steve withdrew hundreds of thousands of dollars for Stephanie's. These loans were not repaid and Stephanie's filed bankruptcy. Steve also acquired a 75% interest in Hixson drugs to receive a cut of profits for drugs supplied to the homes.

Eventually, the money funneled from CHCC to Steve's separate businesses was written off as bad debt. CHCC was a sub-Chapters corporation set up by CPA Judy Breeding. Breeding distributed the bad debt to shareholders. In effect, the Userys used write-offs of their own bad debts to reduce personal taxes.

The Userys also paid money from CHCC to trusts for two of the children, Shawn and Stephanie. In 1988, even as the company declined, over $120,000 was put in the trusts. Many personal expenses were improperly paid by CHCC, such as luxury cars, including Porsches and Corvettes, for each of the Userys at least once a year and sometimes twice a year. The vehicles were not used in the business. Since 1981, they had kept a personal housekeeper on the CHCC payroll and regularly used other CHCC employees for work at their residences. Bills for improving and maintaining their residences were charged to CHCC. When bills showed charges for the residence, Steve assigned a CHCC employee to persuade vendors to alter them so to show charges were for the business.

In three years and eight months, cash withdrawals in forms such as loans to shareholders and Steve's companies (totaling $2,123,226), plus management fees paid to Stesery ($1,376,456 in cost reports), totaled $3,499,691, or an average of $954,000 per year drained from the company. This figure does not include other payments such as CHCC salaries ($75,000 a year plus $100,000 bonuses for Steve and $50,000 for Mary Beth), Steve's additional salary paid by Stesery, automobiles, employees or improvements for their residences, or money to the trusts. If any person beside the Userys had to know what was occurring, it was CPA Judy Breeding, who for many years handled the accounting and taxes for the various businesses and the Userys. Breeding was aware of the dealings among CHCC and the other companies. She helped the Userys perpetuate the drainage by actions such as helping to adjust the books each year, providing audited reports (until 1988), writing off loans as bad debt, perpetually classifying withdrawals as

loans to shareholders even though they should have been taxable income, and preparing records and tax returns allowing the loans, cars and other personal expenditures to be misrepresented. She prepared the reports to the Division of Aging, including the salary requests, even though she knew Mary Beth had not worked in the business since 1981 and Steve spent 10% of his time on the business. Breeding's services helped conceal the irregularities through the years. This was an extraordinary situation where the financial irregularities had to be known to the accountant, rather than a situation where one could second-guess some transactions. Long-time employee Linda Parsons, the controller, accountant and bookkeeper, knew every financial detail about CHCC. She also was aware of the irregularities and helped adjust the books to conceal the irregularities.

In March 1988, the Missouri Division of Aging inspected Northside Nursing Home and found patient care deficiencies that Steve admitted were serious. He admitted that residents had been neglected and found efforts to remedy the deficiencies were "very costly." The Userys tried to blame an administrator for the problems, but Steve was managing the home. The deficiencies arose because in 1987 CHCC reduced its staff significantly in order to reduce payroll expenses and squeeze more profit from the business (as a side-effect, drastically reducing staff made 1987 operating expenses artificially low).

After the March 1988 inspection the Division gave CHCC 55 days to remedy the patient care deficiencies or lose its license. CHCC failed to correct the problems, so to keep operating under a probationary license, CHCC entered a voluntary Consent Agreement. The Consent

Agreement froze Medicaid admissions and increased staff requirements. As a result, CHCC lost revenue due to resident attrition and increased operating costs. Under state law, the probationary license could last only one year; no extensions could be granted. If the problems were not cured and a non-probationary license granted by July 1989, the license would be revoked and the business would shut down in July.

At this time Steve was spending most of his time on his separate Stephanie's, Inc. business. Steve was spending only 10% of his time on CHCC nursing home business even though he continued to collect salaries for full-time work and other payments from CHCC and Stesery, Inc. Breeding was aware that he spent little time on the nursing homes, but she and Steve represented in reports to the Division that he spent all his time on the nursing homes.

B. From November 1988

By November 1988, the Userys decided they could not cure the problems in order to vacate the Consent Agreement and reinstate a non-probationary license. The combination of insider looting and revenue loss under the Consent Agreement had devastated CHCC's financial condition, and in turn, the Userys' financial condition. Steve and Mary Beth were separated (and had separated several times over the years).

Steve spent 90% of his time on his separate Stephanie's business, but he was still managing CHCC. Steve had taken so much money from the nursing homes to support his other business ventures that by November 1988, he was forced to borrow $110,000 from Centerre Bank in an attempt to cover his withdrawals to keep the company going. He represented to Centerre that the

loans were for the business, but he acknowledged at trial that the loans were really personal. He obtained them to replace some of the cash he had recently withdrawn for Stephanie's. Finally, in November 1988 at Steve's insistence, Mary Beth agreed to raise quick money by cashing in her Individual Retirement Account and selling an Acura Legend car she kept at her Florida vacation home.

It was clear to the Userys the nursing home business was disintegrating. At this point in November 1988, Mary Beth contacted CPA Judy Breeding and began to seek a way to solve her problems with CHCC. Mary Beth, with Breeding's assistance, took over the reins of the company and started planning on how to get out of the situation. Judy Breeding was a close friend of the Userys and Mary Beth confided in her. She was also the certified public accountant for CHCC, the other businesses and the Userys. Between November 1988 and before February 9, 1989, Breeding became a director on CHCC's board.

Mary Beth contends she did not know about the, Consent Agreement until November 1988, but the evidence indicates she could have known in July 1988, when the Agreement was entered. Whether she acquired knowledge of the Consent Agreement in November 1988 or earlier is immaterial. From November 1988 on, she was a knowing participant in a fraud designed to conceal the financial condition of the business in order to unload the now-dead golden goose on an unsuspecting buyer, before the homes were shut down in July. She wanted to receive several million dollars so the Userys could complete their divorce and retire at 30. If Mary Beth did not learn of the Consent Agreement until November 1988, that fact weighs against her. It sup-

ports the finding that she had nothing much to do with the nursing home business except to withdraw money and charge-off personal expenses, and that she misrepresented that she was an employee.

Mary Beth also contended she did not know of the financial irregularities until Steve withdrew from the business. The court finds this testimony to be without credibility. Steve and Mary Beth constantly took huge amounts of cash from the company, and always had, both before and after Mary Beth stopped working. Mary Beth would simply call and ask for money to be sent to her. Mary Beth had to observe the huge amounts they were spending, both personally and on Steve's business ventures. Even if she did not know the precise amounts Steve was taking, it would be impossible not to know he was taking large sums for his businesses in addition to distributions of profit to shareholders, shareholder loans, and payment of personal expenses such as cars and housekeepers. She acknowledged that she knew shareholder loans were more than $1 million. She had to know the entries were classified and adjusted to conceal the irregularities so she could continue to receive shareholder loans as personal income.

A resignation letter dated January 12, 1984, from John Pratt, a former director and counsel, states he was resigning because Mary Beth refused to take his advice and did things such as entering the Stesery, Inc. management contract contrary to his advice. Mary Beth's claim that she had no knowledge of irregularities is rejected. Even if one assumes she did not know the minute details, she had to know irregularities were

occurring. Moreover, she was still a board member with fiduciary responsibilities.[1]

After considering all the evidence in this case, it is with regret that the court concludes Judy Breeding, an accountant and specialist in the nursing home field, helped the Userys, her close friends, clients, and fellow directors on the CHCC board, to withdraw excessive funds, conceal the drain through the years, and then dispose of the business with knowledge that its condition was not accurately represented to the buyers. Shortly after Mary Beth contacted Breeding in November 1988 for help on the financial problems, Ms. Breeding called Mr. Gourley, a well-known nursing home manager with whom she had worked in the past. She had performed services for Gourley in his business and in his pending divorce. From the work on the divorce, Breeding knew Gourley had substantial assets, including cash, but that the cash was frozen in the divorce proceedings. Gourley trusted Ms. Breeding since she had worked for him and was well-known in the industry. Gourley alleged that Breeding abused his trust and her relationship with him because she allegedly called him on a pretense when she was actually setting him up as an unwary buyer for the homes.

Ms. Breeding arranged for Mary Beth to meet Mr. Gourley, ostensibly to look at office space he had for rent. Mary Beth told Gourley she was getting a divorce and mentioned that one of CHCC's nursing homes was

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[1] In order to avoid admitting that she had misrepresented her employee status to the Division of Aging, Mary Beth tried to establish that she was an employee who was available if needed. She cannot have it both ways. If she was head of the accounting department, she would have to have even greater knowledge than the court has attributed to her.

operating under a Consent Agreement with the Division. Mr. Gourley expressed his willingness to provide office space and some informal management advice to help Mary Beth correct the Consent Agreement problems.

In February 1989, Mary Beth formally took over management of the nursing homes from Steve. Steve was in a psychiatric unit due to the stress of the business problems and the divorce. Mary Beth and Judy Breeding, now a board member, were in charge. At a board of directors meeting on February 15, 1989 Steve agreed to terminate Stesery, Inc.'s management agreement (he was later paid at least $ 5,000 for the agreement) . On February 22, Mary Beth requested the state court to appoint a receiver for Stephanie's, Inc. and Stesery, Inc. because Steve was not managing the businesses. She then had the order stayed and eventually vacated on March 24, 1989.

C. From February 1989: Negotiations and Sale

During the transition period from November 1988 through February 1989, when Mary Beth was taking over and getting Steve out with Judy Breeding's assistance, the clock continued ticking toward the date for the license to be revoked and the homes, the source of all cash, to shut down. In late February or early March, Mary Beth and Breeding again met with Gourley. Mary Beth told Gourley that a buyer had offered to purchase CHCC's assets as going operations for $7,200,000. The business was portrayed as basically healthy, with a temporary problem due to Steve's departure and the Consent Order that Gourley, as an experienced nursing home manager, could correct without difficulty. They discussed the cash flow of the business and Breeding

suggested the Gourleys enter a lease with an option to buy CHCC's properties. Gourley was interested, but at the next meeting, Mary Beth told him she was interested only in an outright sale of assets.

On March 10, 1989, Mr. Gourley met with Steve, Mary Beth, Judy Breeding, and Linda Parsons, CHCC's controller, accountant, and bookkeeper. Gourley offered $7,200,000 for the business, but Steve, after consulting with Mary Beth, responded that the nursing homes were good homes and profitable homes, and the assets were worth $8,000,000. Breeding was present when Steve said the homes were "good" and "profitable." At that meeting the parties agreed to a price of $8,000,000 for the CHCC assets, including two nursing homes, a retirement complex, and a laundry, if figures such as cash flow were acceptable.

In the negotiation meetings, the Userys (including Breeding and Parsons) made representations. Two of the material representations were positive, direct statements about the amount of cash flow and the amount and ages of payables. A third representation was the amount of business-related long-term debt. Due to statements made by Mr. Gourley, they knew the representations were material and he would rely on them. The information was critical to his ability to buy and successfully operate the homes.

During the March 10 meeting, Gourley again emphasized the fact that he had no cash to put into the homes, so they had to produce sufficient cash flow to pay operating expenses, service existing debt, pay the Userys for their equity in the assets, and provide the Gourleys with a profit. The Gourleys needed assurance that the business would generate sufficient cash flow to pay the

above items, so Gourley asked Breeding what the cash flow was in 1988. Breeding and the Userys said that although one home was operating under a Consent Agreement, the 1988 cash flow was substantially the same as the 1987 cash flow. Gourley asked to see 1988 financial information. The Userys told him that no complete or reliable financial information existed for 1988, but that the 1988 data was the same or comparable to that for 1987, for which there was an audited report, and the 1987 data could be relied upon to assess 1988 performance. They said the 1988 information was not available because the books would not be closed until at least June 1989, and because of the disorganization in CHCC's office due to the Consent order and Steve's withdrawal from management.

The parties on the Usery side, including Judy Breeding, worked with calculators and engaged-in discussions with each other to determine cash flow. Ms. Breeding and Steve referred to a 1987 audited financial statement for the 15 month period ending December 31, 1987. They told Mr. Gourley that after management fees to Stesery, Inc. and payment of existing debt service, the 15 month cash flow was $1,200,000 or $960,000 per year. After deduction of debt service Mr. Gourley calculated that the represented cash flow would be sufficient to operate the homes, pay existing debt and the Userys, and leave $500,000 per year profit.

The Userys deny ever making any representations about financial data, that 1988 records were not available or that 1987 records would be substantially the same. The court finds the representation was made that the 1988 financial data and cash flow was the same or substantially the same as the 1987 audited report. The Userys knew the representation was false. They in-

tended for Mr. Gourley to rely on it because they wanted him to buy the homes. It was material since Mr. Gourley would rely on the figures to decide whether the homes would generate sufficient cash flow for him to buy them. They knew he would rely on the representation, especially since part of it was that no 1988 records existed.

An important piece of evidence controverts the Userys' denial of ever making such a representation. During this period, the Userys made the same misrepresentation to their appraiser, R.L. Harrison, as referenced in a letter he wrote. He had appraised the nursing homes for the Userys earlier. When the sale was negotiated with Gourley, the Userys asked Mr. Harrison to update the earlier appraisal for Gourley to submit to Landmark Bank in order to obtain an operating credit line, which was a term of the sale agreement. Thus, they again knew the representation, now made through Mr. Harrison, would be material and relied upon. In the letter updating the appraisal, Mr. Harrison said he relied an the 1987 financial report for the 1988 performance because the Userys represented to him that the 1988 financial data was not available, but was substantially the same as the 1987 audited report.

The mathematical accuracy of the 1987 audited statement is unchallenged. The Gourleys introduced evidence tending to prove that the cost of operating these nursing homes was comparable to those of other homes in the state. However, the Userys operated them below normal cost in 1987 by understaffing the homes, which in turn resulted in the Consent Agreement. The true results of 1988 operations (and presumably 1987 and earlier years, for which irregularities were concealed and not accurately reported) were vastly different from the Userys' representations.

Although the Userys said there were no reliable 1988 financial records that Gourley could review, after Gourley purchased the homes an employee found the 1988 records hidden in a corn flakes box at the Northside Nursing Home, apparently forgotten when the Userys moved out. These records were dated only two days before the day Gourley had requested to see the 1988 records. The hidden records showed that in 1988, CHCC's cash flow was actually only $35,615 per month ($427,380 per year), which would yield Gourley only $1,901.04 per year profit after servicing existing debt.

During meetings in March 1989, Ms. Parsons, the CHCC controller and accountant, told Gourley that accounts payable for the facilities totaled $75,000 and were current. She gave or showed him the list of payables from the company records. She made this representation to Gourley in the presence of Breeding and Mary Beth. Again in April, when Mary Beth and Gourley were meeting in preparation for the transfer, Parsons represented in front of Mary Beth that payables were $75,000.

In fact, CHCC owed $538,417.19 in accounts payable expenses. Many accounts were seriously delinquent, up to or past 120 days. These accounts were not disclosed in any financial records, which supposedly were all maintained in a computer. In order to make the payables appear paid on the computer records, checks were written and noted on the computer, but the checks were held. Breeding had earlier advised Parsons that the computer software could list the payables with "held" checks with the other financial reports. The payables where checks were held were kept off the books on a secret list, maintained manually by Parsons and used only for internal review. The list was known to Parsons, the Userys and Breeding. The list was not disclosed to

outsiders, such as Gourley or the Missouri Division of Aging. In fact, on the 1988 Financial and Statistical Report for Nursing Facilities, filed with the Division of Aging, the Userys misrepresented payables as $86,000.

The Userys and Ms. Breeding knew Mr. Gourley's financial status. Gourley told the Userys and Breeding that he did not have additional money to invest and would be dependant on the represented cash flow, so the representation as to the amount and age of payables was material. The only new funds to which he would have access was a $500,000 operating credit line, to be obtained by Gourley as part of the agreement so the Gourleys could cover any unanticipated start-up costs. There was testimony that the industry rule of thumb for cash needed for operating expenses immediately after purchase is the amount of two months of Medicaid receivables, which would have been about $500,000 here.

A contract for the sale of assets was signed on April 18, 1989 and was to close May 25, 1989. As finally executed on April 18, the Asset Purchase Agreement provided the purchase price was $8,000,000. Part was to be paid by a credit on the balance due for the Gourleys' agreement to assume long-term debt related to the business. The long-term debt was supposed to be $4 to $4.2 million, so the assumption would reduce the balance due to about $3.8 to $4 million. The noteholders for long-term debt, who had deeds of trust on the properties, were New York Life, Eureka Federal Savings, Centerre Bank of Springfield (now Boatmen's National Bank of Springfield), Boatmen's National Bank of Springfield, Landmark Bank and Hixson Drug, Inc.

The Asset Purchase Agreement also provided the Gourleys would assume CHCC's accounts payable, rep-

resented at $75,000, for an additional credit on the balance due, and the Gourleys would receive CHCC's accounts receivable, estimated at $250,000 from Medicaid, in order to generate cash for initial operational costs after the sale. The purchase price was to be adjusted for the receivables and payables, but it was expected that receivables would exceed payables so the Gourleys could get some operating cash. The payable and receivable balances were to be offset against each other in a "net-out" transaction which should have taken place a few weeks after the sale.

Between April 18, 1989 when the Asset Purchase Agreement was signed and May 29, 1989 when the deal closed, as Gourley was stepping into the operation, Mary Beth requested an advance payment of $125,000. She said she had discovered a payroll problem. She then requested more money from the Gourleys' credit line which was supposed to be a reserve for use after the purchase. By this point, Gourley had begun the transition to take over the businesses, and was so far committed financially that he could not walk away from the contract. Thus, he drew on the credit line as Mary Beth requested. Between April 18 when the contract was signed and May 29, when it closed, CHCC creditors had already consumed over half the credit line the Gourleys had intended to use when they took over. Thus, the Gourleys were left with $233,000 rather than an anticipated $500,000 to pay operating expenses and payables.

D. From May 1989: After the Sale

After the sale, the Userys assigned the purchase money note given by the Gourleys as of May 1, 1989 to a liquidating trust. On January 5, 1990 the trust beneficiaries were: Mary Beth, 51%; Steve, 24%; and James McLeod, trustee of the two children's trusts, 12

1/2% for each trust. Mary Beth and Steve's divorce became final on August 24, 1989. As part of the divorce settlement, the liquidating trust was revoked and the interests of the shareholders were declared to be: Mary Beth, 51.37%, Steve, 16.53%, and the two children's trusts, 16.05% each.

The net-out transaction never took place. Therefore, the Gourleys found it impossible to determine the amount the Userys should have credited the purchase price for payables and the credit was never made. The court rejects the Userys' argument that the positive misrepresentation of the accounts payable was not material because the bottom line was not affected and, had the net-out taken place, the payables would simply have reduced the purchase price.

The unexpected payables created a serious problem when it was discovered, gradually, that they totaled $538,417.19 and not $75,000. First, as Mr. Gourley had advised the Userys during negotiations, he had no cash except for the $500,000 operating credit line, and he was dependant on the cash flow representations. After the Gourleys started operating the homes, they began to pay the listed payables, but the vendors applied their payments to old accounts, so bills the Gourleys thought they were paying remained unpaid. After operating the business for a time, the Gourleys realized their suppliers were using the Gourleys' operating capital to pay off CHCC's delinquent accounts. The Gourleys were put on a "cash only" basis for current supplies and services. In several instances suppliers sued the Gourleys on delinquent accounts, causing legal expenses, damage to the homes' reputations, and delays in regeneration of the patient census. In addition, payment of the undisclosed debts in excess of half a million dollars caused a prompt

depletion of cash flow, which deprived the Gourleys of cash for other expenses. These payments and attendant problems were not, as the Userys contend, the functional equivalent of simply having the purchase price reduced by the amount of payables.

Two long-term debts the Gourleys assumed were notes totaling $110,000 to Centerre Bank. These loans were unrelated to the business, but were falsely included on the "related" list. At trial, Steve admitted they were loans he obtained to cover funds he had withdrawn from CHCC for himself and his separate businesses, such as Stephanie's, Inc. The loans were obtained through the business but for his personal benefit.

In addition, the Userys included an $18,000 debt to Breeding as a business-related debt, even though they knew it was not. After closing, Gourley was dependant on Breeding to prepare the Medicaid Cost Reports which were required by the Division of Aging. She had always prepared the reports and was the only one who could do them at this time since Gourley had just taken over the business. She refused to prepare the reports until Gourley paid the $18,000 bill. He could not ascertain what accounting work had been done for CHCC, so he requested an itemized copy of the bill and discovered the bill was for services billed to the Userys personally for tax advice on personal tax consequences from the sale. Even though the bill was not related to the business, the Userys refused to pay it, so Gourley had no choice but to sign a promissory note for the bill so Breeding would prepare the reports.

After the sale, when operational problems resulting from the misrepresentations became apparent, the Gourleys tried to negotiate new payment terms with the

Userys, but negotiations were unsuccessful and the meetings broke up bitterly. Meetings on the post-sale disputes were attended by the Userys, plus CPA Breeding and lawyer William Hart, and the Gourleys, plus their lawyer, Devon Sherwood.

The first meetings were held in an effort to arrive at the amount for a new note for the expected net-out transaction, but later meetings focused on the difference in representations made by the Userys during negotiations and actual operations as a result of serious discrepancies in items such as cash flow and payables. The Userys contend Mr. Gourley never used the express word "fraud." However, there is no requirement of a magic word so long as the idea was communicated using equivalent terms. The court finds credible Mr. Gourley's testimony that it became clear he had been defrauded at the point the employee found 1988 records hidden in a corn flakes box, and the descriptive words changed at that point. In any event, whether Gourley personally used the word "fraud" is immaterial because his attorney, Mr. Sherwood, used words such as "fraud" and "misrepresentation" during the meetings and in discussions with Mr. Hart, as acknowledged by Mr. Hart.

Eventually the Gourleys stopped making payments because there was not enough cash to make them. During this time, Mary Beth needed cash and requested loans and payments from the Gourleys. The Gourleys made $23,000 in payments to her, and Mary Beth said they would be credited against the balance owed on the note, but they were not. Mary Beth had not disclosed her receipt of $23,000 to the other payees - - her former husband and the children's trusts - - so she could not credit the payments to the note.

As noted earlier, the Gourleys were deceived into assuming personal debt the Userys had included on the long-term debt list. These debts were the Centerre loans of $110,000 and the Breeding accounting bill of $18,000. In addition, the Gourleys assumed $538,417.19 instead of $75,000 in payables. The payables should have been offset with the Medicaid receivables of $236,681.79.

The Gourleys had to borrow funds and contribute their own capital, in the total amount of $1,879,506.85, to cover the cash flow shortages and to cover the capital drain by the Userys and their companies. The Gourleys had to pay interest of $428,535.23 on the funds borrowed, and lost $12,997.83 in interest on their own funds (based on 4% interest), for total interest lost or paid of $441,533.06. The amounts borrowed, personal funds contributed, and interest expenses total $2,321,039.91.

At trial, both sides offered expert testimony on the actual value of the property at the time of sale, versus the price (and represented value) of $8,000,000. The Usery expert, Mr. Scott, valued the homes as of May 1, 1989 at over $9,000,000, substantially more than the purchase price, using a 12% capitalization rate. In light of the subsequent operation by Gourley, an experienced manager (but not an experienced purchaser), the Usery valuation is unreasonable since the operations could not be supported at the lesser $8,000,000 purchase price. The Userys contended they disclosed all problems and then sold the homes for $8,000,000. If all the problems in evidence at trial had been known to the buyers, it is difficult to imagine the Userys would ask or expect to receive $8,000,000, much less the figure suggested by their expert.

The Gourley expert valued the homes as of May 1, 1989 at $5,175,000. He used an 18% capitalization rate and the same appraisal method used by the Userys' former appraiser, Mr. Harrison, whose updated report they provided to Landmark Bank. The court adopts the valuation of the Gourley expert. More discussion of the experts is in the section on credibility of witnesses.

V. WITNESS CREDIBILITY

Additional facts are included in this section on credibility of witnesses. "The determination as to credibility of a witness is within the province of the bankruptcy judge - - i.e. the trier of fact." *In re Martin*, 963 F.2d 809, 814 [4] (5th Cir. 1992). The court finds the Gourley witnesses more credible than the Usery witnesses. The court further finds that much of the testimony presented by the Userys, one of their main witness, Linda Parsons, and to a lesser extent Judy Breeding, was not credible.

A. Valuation Experts

Both sides presented experts who testified as to the value of the business. Mr. Scott, the Userys' expert valued the homes as of May 1, 1989 at over $9,000,000, far in excess of the $8,000,000 paid for the homes. Mr. Lynn, the Gourleys' expert, valued the homes as of May 1, 1989 at $5,175,000.

The Userys' valuation expert was less credible than the Gourleys' expert. Mr. Scott, the Userys' expert, was tainted by personal interest and bias. Mr. Scott had a personal interest in the outcome of the trial because he wanted to help Mary Beth get the assets back so he could lease the nursing homes from her. In fact, he had agreed to repeat the Userys' practice of showing Mary Beth as

an employee. As part of the proposed lease with Mary Beth, Mr. Scott would name Mary Beth as Public Relations Director and pay her a salary even though she had no training or experience. Mr. Scott also had a personal grudge against Mr. Gourley dating from a time they were both employed by the same company and Mr. Scott was terminated. Although the allegations were not clear, it appears Mr. Scott had accused Gourley of wrongdoing, the business owner decided there was no wrongdoing and sided with Gourley, and later Mr. Scott was terminated.

In addition, Mr. Scott's valuation analysis was not as knowledgeable or thorough as the analysis by the Gourley expert. Mr. Scott had a real estate broker's license and was not a credentialed appraiser. He did not know what a capitalization rate was or how one was determined, even though it is a basic component of a business valuation. He employed a 12% capitalization rate simply because it was the one he had used when he worked for a large nursing home company which bought homes around the country. He had always used a 12% capitalization rate, without understanding why, despite any difference in investment risk, interest rates or returns at different times or in different industries. He did not reflect a thorough understanding of the formula or the criteria he employed to value the business purchased by the Gourleys.

In contrast, Mr. Lynn, the Gourley expert, fully explained his analytical process and data, and how he determined an appropriate capitalization rate. He used a higher rate than the Usery expert, but he explained how he calculated it and why he used it. He demonstrated a thorough understanding of what a capitalization rate represents. In contrast to Mr. Scott, Mr. Lynn

did not have a personal interest or bias concerning the business or parties. Mr. Lynn was more persuasive and credible than Mr. Scott. The court adopts the valuation of $5,175,000 presented by the Gourleys.

B. The Userys

The Userys were dishonest even with each other. One could conclude, as the Gourleys allege, that Steve was draining money from CHCC to Stephanie's, Inc., his separate business, in preparation for the eventual divorce. Mary Beth claims Steve failed to inform her of the Consent Agreement until November 1988 and that she found out about it only when he asked her to sell a car and cash in her IRA. This was more than three months after CHCC entered the Consent Agreement on July 26, 1988. Mary Beth took $23,000 from Mr. Gourley and promised to credit it as payments on the note, but she could not because she had concealed her separate requests for payments from the other payees.

The Userys and CPA Judy Breeding knowingly misstated to the Division of Aging the Userys' salaries, the tasks performed and time spent managing the business to earn the salaries, and even that Mary Beth was employed by CHCC as head of the accounting department. Mary Beth was ignorant of all accounting and bookkeeping procedures and could not define any bookkeeping terms, even in the most general lay terms. At most, she may have occasionally reconciled a few bank statements if Steve brought them home in the evening, but there is no credible evidence she even did this. The title was an intentional misrepresentation to the Division.

About the time of the Gourley negotiations the Userys also submitted reports to the Division which were pre-

pared by Ms. Breeding with information provided by Ms. Parsons and Steve. This report represented that payables were only $86,000, when the off-books list maintained by Parsons showed payables were hundreds of thousands of dollars. The Userys also knowingly misrepresented income and expenses on both personal and business tax returns since they characterized improper withdrawals as shareholder loans which were never repaid or reported as taxable income, and deducted a $10,000 political donation as a charitable donation. They also did not disclose improper business expenses that should have been declared as personal income, such as expenses for luxury automobiles, improvements to the Userys' homes, and CHCC employees who worked at the Userys' homes.

In addition, in the midst of trial it was discovered that Mary Beth had provided false financial statements to a bank and false statements in her bankruptcy schedules. She represented in writing to the bank in 1989 that she had $300,000 in jewelry, art and antiques. These items were not listed in her bankruptcy schedules, and the few items of jewelry, art or furniture which were disclosed were described as in Mary Beth's possession but owned by her mother. During trial, several distinctly different explanations were reported by counsel for this inconsistency, but when Mary Beth testified, she disavowed any knowledge whatsoever.

C. Linda Parsons

The first Usery witness, Linda Parsons, was a critical witness. She was in charge of all financial records. She, rather than Mary Beth, was head of the accounting department. Based on observation of her demeanor and her testimony, the court finds Linda Parsons was not a

credible witness. The court concludes she was a knowing participant in the financial manipulation and concealment for many years before the sale, and in the misrepresentations to the Gourleys. For example, she is the one who maintained a secret list of payables of $538,417.19, while representing at meetings that payables were $75,000 and current.

She had worked for the homes since Mary Beth's mother operated them in the 1970's. She knew every financial detail and transaction in the business. She was responsible for the computer-maintained financial records; for running all types or reports, such as monthly balance sheets showing monthly and year-to-date figures for each facility, and final year-end statements and consolidated balance sheets; for closing and reconciling the books at the end of each year; and for getting money to Mary Beth when asked for it. She knew about the salaries, bonuses and shareholder payments made to Steve and Mary Beth. She knew that Mary Beth had not worked since the early 1980's when she decided to stay home, that Mary Beth still received a salary, that the Userys received substantial sums which were classified and carried over as loans to shareholders, that CHCC employees worked at the Usery home, and that personal expenses were paid by the business, including expenses such as car insurance for Mary Beth's mother. She also worked with Breeding to provide the necessary data and back-up documents for tax returns, audited financial reports and Medicaid Cost Reports. The evidence is that she is the person who assembled computer reports for the negotiating meetings and provided the false payables information at more than one meeting.

As a witness, Parsons tried to justify her actions and the Userys' in years of maintaining false records, and in

actions such as maintaining dual lists of accounts payable to slant the financial picture. When it was in the Userys' best interest, and therefore her own best interest as a participant in questionable activities, she had perfect recall and absolute knowledge. She remembered every detail that was bad for the Gourleys' case.

She was portrayed by the Userys' counsel and her own testimony as extremely knowledgeable person with great expertise, who understood the nuances of the complex financial records and could explain why the Userys were right and the Gourleys were wrong. Referring to herself as the CHCC controller and as an accountant, she demonstrated her depth of knowledge by testimony which showed her mastery of the complexities of financial records. She testified with authority on direct examination, remembering financial information and specific details of events which occurred years ago. She said she knew everything about the business.

Although she remembered details on direct examination, on cross-examination she could not remember any information and said she had not looked at the statements since 1989. Finally, under the pressure of covering for herself and the Userys, she broke down in an episode of distraught sobbing. The outburst came at an unexpected, innocuous point. Opposing counsel asked Ms. Parsons to add some numbers with a calculator.[2] Based on her assertive attitude during direct examination, the court is confident that if Ms. Parsons was simply nervous at adding the figures in public, she would not have hesitated to request a break to complete

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[2] The court makes no finding as to the correctness of her operation, or even whether she was given the appropriate figures. The significance is Ms. Parson's demeanor.

the calculation. However, in the midst of the calculation, Ms. Parsons broke down, began sobbing and was unable to complete the simple operation. After she calmed down, when asked why she had become so upset she began sobbing again and said, "I have tried to be so honest . . . ." In observing her demeanor and listening to this defensive statement, she sounded as if she was about to be exposed. It appeared that the stress of maintaining a facade to cover the actions of herself and her employers in keeping false books and in mishandling company finances for many years finally became, unbearable when she was asked to go through mathematical calculations which she feared would demonstrate the falsity of her story and her complicity in the Userys' actions.

Parsons admitted she maintained a secret list of the true accounts payable, although CHCC's accounting software could list unpaid accounts on which checks were being held so the computer generated books would reflect accurate balances. Parsons kept this list separate from the accounting software even after she was advised by Breeding that she should keep the full payables on the computer. The secret list showed the actual large payables while the computer list shown to Gourley and used for the Medicaid Cost Reports reported a much smaller, false payable list.

On direct examination, Parsons acknowledged that the off-books list was "the one tacky thing" she had done, but dismissed it as unimportant and simply a private aging list not meant for public review. On cross-examination, she admitted that it was more than a private aging list, since the computer showed these payables as paid, but the list showed that checks were written but held. She said the list was only for internal use, to show

the real bank balance for herself and the Userys. She then acknowledged that these payables could not be listed on the computer records to show the real bank balance, because it would show the bank account to be seriously overdrawn (or that the checks were not actually issued as payments, in order to avoid being overdrawn).

D. Judy Breeding, CPA

Judy Breeding had provided professional accounting advice to the businesses and the Userys personally for many years. She had advised them about business matters, prepared business and personal tax returns, performed audits, and prepared financial reports. In addition, she and her husband were close friends of the Userys and Mary Beth confided in Breeding.

Breeding denied any knowledge of misrepresentations. She testified that she only offered tax advice and was not involved in any CHCC management decisions. However, Ms. Parsons testified that at the end of each year Judy Breeding made the final adjusting journal entries and gave them to Parsons to insert. Parsons said Breeding was given all the documents to prepare the taxes, including items such as records showing the time employees worked at the personal residence. Breeding and her accounting firm did annual audits and prepared financial reports for CHCC and the facilities. She and the firm reviewed financial records and reviewed back-up documents as part of the audit. It is impossible that Judy Breeding was not aware of the substantial financial and recordkeeping irregularities and that information was doctored and concealed in a pattern extending over many years. She knew, for example, that an off-books list had been maintained to show the real payables but that the computer showed these bills as paid.

Breeding also had to have knowledge of the irregularities because she prepared all business and personal tax returns for CHCC and the Userys (and had converted the business to subChapter S for tax purposes).[3] She knew of the transactions among CHCC and Steve's other businesses. For tax returns, Breeding annually classified the Userys' cash withdrawals, totaling more than $1 million, as loans to shareholders so the Userys were never, during the time they owned the business, charged with taxable income for the withdrawals. Breeding also helped the Userys write off as bad debts on their personal taxes the money withdrawn by Steve for Stesery, Inc. and Stephanie's, Inc.

Ms. Breeding also had to have knowledge that representations made to Mr. Gourley at the meetings could not be correct if for no other reason than that since November 1988 when Mary Beth called her, she had known the business was devastated, and everything she learned after that time, while joining the board and trying to help Mary Beth, simply increased her knowledge of the devastation. Although Ms. Breeding testified that she only offered tax advice and was not involved in any CHCC management decisions, she was a member of CHCC's board of directors, with the atten-

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[3] In 1988, CHCC made a $10,000 political donation to a gubernatorial candidate because Steve thought this person, if elected, would be influenced to call off the Missouri Division of Aging and to stop inspections and questions about the homes. Ms. Parsons, the bookkeeper and controller, knew the donation was political and not charitable. The $10,000 political donation was shown as a deductible charitable donation on 1988 tax returns prepared by Breeding. Based on the evidence, one could conclude that the improper deduction was intentional or at least by negligent oversight. The court makes no finding in regard to the $10,000 donation, although the tax treatment raises questions.

dant fiduciary management obligations, starting some time between November 1988 and February 9, 1989, until the agreement to sell CHCC's assets closed in May 1989.

Breeding was present for all significant meetings for negotiations between Mr. Gourley and Mary Beth, and Mr. Gourley and both Userys in March 1989. She discussed CHCC's cash flow with Gourley. She suggested the lease with an option to buy the CHCC assets. Finally, on March 10, 1989, Breeding was present at the final meeting where the parties negotiated a price of $8,000,000. At this meeting Breeding and Steve told Gourley that the cash flow for 1988 was substantially the same as that for 1987, and Breeding and Steve calculated figures such as cash flow with their calculators. They referred Gourley to the 1987 audited financial statement prepared by Breeding and her firm.

Her presence and her statements in the meeting pertained to the condition of the business, its cash flow, value, and terms of sale, not just to the Userys' personal tax consequences. Breeding was present when Steve said the homes were "good" and "profitable" and she knew they were not. She was present when Parsons gave Gourley a computer list of payables and represented that accounts payable were $75,000 and current, although she knew Parsons had kept off-books records of payables showing that checks were held.

VI. LEGAL DISCUSSION

A. Introduction

The Gourleys contend the Userys made three positive misrepresentations: 1) that cash flow in 1988 was substantially the same as that of 1987; 2) that the accounts

payable balance was $75,000 and the accounts were current; and 3) that the debts assumed in the sale related to CHCC's business. The court finds that the Userys (including their agents, Parsons and Breeding) did make the intentional, fraudulent misrepresentations.

In response, the Userys contend CHCC operated successfully for years but that after the Consent Agreement CHCC's financial position first began to deteriorate, at which point the Userys sold the CHCC assets to the Gourleys. The Userys contend they fully apprised the Gourleys of the Consent Agreement, and the financial problems resulting from it, and that no other financial data was misrepresented. The court rejects these contentions and concludes that the Userys treated the business as a personal cash reserve until they depleted it, at which time they made fraudulent misrepresentations about the finances in order to conceal the true condition of the business so they could unload it before it was permanently closed in July 1989. It is true that Gourley was advised of the Consent Agreement problems, but the Userys portrayed the homes as in healthy condition, "profitable homes" with just a temporary problem. With the cash flow as represented, and his management experience, Gourley reasonably believed he could correct the problems. However, the financial data as to cash flow and payables was grossly false, so Gourley's plan necessarily failed.

B. Burden of Proof

Userys contend the burden of proof in a fraudulent misrepresentation case is clear, cogent and convincing evidence. The Gourley evidence was clear, cogent and convincing and, therefore, met the standard asserted by

the Userys. However, after reviewing Missouri cases, the court concludes the applicable standard is actually preponderance of the evidence, although the strong evidence in this case met the higher standard.

The Gourleys included an unusual count to cancel the sale contract but to allow them to keep the property, which may have been equitable, but relief was not granted on that count. The fraud case submitted was legal, not equitable, in nature and could have been tried to a jury under Missouri law.[4] Under Missouri law, in a routine fraud case or a case that could have been submitted to a jury the applicable standard is preponderance of the evidence, not clear and convincing evidence.

The Missouri Supreme Court has held the burden of proof in fraudulent misrepresentation cases that could be tried to a jury is preponderance of the evidence. The leading case, *Crawford v. Smith*, 470 S.W.2d 529 (Mo. banc 1971), involved a seller's alleged fraudulent misrepresentations, as in the present case. Crawford, 470 S.W.2d at 531-32 [1], held that "in a fraudulent misrepresentation case tried to a jury, the burden of proof is not greater than in other cases tried to a jury, and the proper burden of proof instruction is MAI 3.01." Missouri Approved Instruction 3.01 establishes the proper burden of proof in a jury case, which translates to preponderance of the evidence. *Baker v. Bickel*, 386 S.W.2d 105, 111 [8,9] (Mo. 1964), an earlier Missouri Supreme Court decision, explained that parties who contend the standard is greater "cite equity cases, in which such remedy

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[4] In bankruptcy court, there were no jury demand issues. The parties did not request a jury trial so the actions were tried to the court.

as cancellation is sought, but these have no application to jury cases ... our rule is that the burden of proof on fact issues to be decided by a jury does not change with the kind of case to be tried."

An especially instructive case is *Hartsfield v. Barkley*, 856 S.W.2d 342 (Mo. App. 1993), where a seller's fraudulent misrepresentation was also alleged. *Hartsfield* rejected the proposition that a fraud case tried in state court has a higher standard of proof than one tried in bankruptcy court under 11 U.S.C. § 523. *Hartsfield*, 856 S.W.2d at 346-47 [7,8], explained that in fraud cases the burden of proof was preponderance of the evidence in both state court actions at law (triable to a jury) and bankruptcy court dischargeability cases (citing the Supreme Court in *Grogran v. Garner*, 498 U.S. 279 (1991), and the Missouri supreme court in *Crawford, supra).*

Two additional cases that alleged a seller's fraudulent misrepresentations and cited *Crawford, supra*, in holding the burden of proof is preponderance of the evidence, are *Walters v. Maloney*, 758 S.W.2d 489, 496 (Mo. App. 1988), and *Cotner v. Blinne*, 623 S.W.2d 615, 618 (Mo. App. 1981). *See also Glass Design Imports, Inc. v. Import Specialties*, 867 F.2d 1139, 1142 [1] (8th Cir. 1989) (citing *Crawford v. Smith*, 470 S.W.2d 5291 531-32 (Mo. banc 1971) and Missouri Approved Jury Instruction 3.01); *Hewlett v. Hewlett*, 845 S.W.2d 717, 719 [2] n.2 (Mo. App. 1993) (case decided by the court, not a jury, concerning fraud in a settlement agreement); *Philadelphia Life Ins. Co. v. Moffat*, 783 S.W.2d 133, 136 (Mo. App. 1989) (burden of proof is preponderance of the evidence, not clear and convincing evidence, even though part of the action may have originated as non-jury interpleader, but all claims were joined and tried to a jury). Finally, the treatise *Missouri Evidence* explains

that in some states, "a higher degree of proof than that of a preponderance of the evidence is required in some cases to prove the fact of fraud .... In Missouri, however, the decisions indicate that proof by a preponderance of evidence is all that is required as to both fraud and malice." 1 Spencer A. Gard, *Missouri Evidence*, § 411, Comment (1985).

The above authorities also hold that fraud can be established by circumstantial evidence. Fraud is rarely established by direct proof since the party charged with fraud is unlikely to admit the wrongdoing. *See Glass Design Imports v. Import Specialties*, 867 F.2d 1139, 1142 (8th Cir. 1989). A fraud claim based on circumstantial evidence will fail if the evidence shows only "facts and circumstances which are equally consistent with honesty and good faith." *Meyer v. McGarvie*, 856 S.W.2d 904, 907 [6] (Mo. App. 1993) ; *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520, 1525 [1] (W.D. Mo. 1992) (citing *Macon-Atlanta State Bank v. Gall*, 666 S.W.2d 934, 941 [11] (Mo. App. 1984)). The facts in this case clearly demonstrate fraud and are not "equally consistent with honesty and good faith." It is immaterial whether the burden is preponderance of the evidence or clear, cogent and convincing evidence because the Gourleys met both standards.

C. Fraudulent Misrepresentations

The Userys contend the Gourleys did not establish any misrepresentations under the following elements, and that any fraudulent representations were not material or did not cause injury. The elements of fraudulent misrepresentation are: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) the speaker's

intent that the representation be acted upon by the person and in the manner reasonably contemplated; 6) the hearer's ignorance of the falsity of the representation; 7) reliance by the hearer on the truth of the representation; 8) a right to rely thereon; and 9) consequent injury proximately caused to the hearer. *Eagle v. Swanger*, 787 S.W.2d 806, 809 [7] (Mo. App. 1990) ; *see also Norden v. Friedman*, 756 S.W.2d 158, 164 [14] (Mo. banc 1988).

The three misrepresentations were: 1) 1988 figures were the same as 1987 figures, so the 1987 audited report which showed $960,000 per year cash flow after debt service should be used to assess 1988 performance because there were no reliable 1988 records; 2) accounts payable were $75,000 and current; and 3) only business-related debts were included in the list of long-term debt to be assumed. The court finds that as to each alleged misrepresentation, the Gourleys have established the nine elements.

First, the court finds that the representations were made, as discussed in the findings of fact, either by the Userys directly or by their agents or employees, such as Linda Parsons, under the direct supervision and in the presence of Mary Beth, Steve or both.

Second, the representations were false. The cash flow and other figures for 1988 were not the same as for 1987, and in fact, were drastically different; the payables were $538,417.19 and extremely delinquent, as opposed to $75,000 and current; and the Centerre and Breeding debts were not business-related, as had been represented when the list was presented.....

Third, the misrepresentations were material. The first two as to cash flow and payables were especially

significant since they were critical to the decision to buy the assets, and the Userys knew the Gourleys were relying on those figures to project operations because they did not have additional cash to contribute and the cash flow had to pay all operating expenses, service debt, pay the Userys on the seller-financing, and pay a profit to the Gourleys. The third representation as to debts assumed was also material since it affected the amount of money the Gourleys had to pay on outside debt at the outset and caused the Gourleys to pay $128,000 more than they should have paid.

Fourth, the speakers, including the Userys and Parsons, knew the representations were false. They knew that reliable 1988 records did exist (they were reliable because they had not yet been doctored). In fact, reports dated two days before Mr. Gourley's request were hidden in a corn flakes box and accidentally left behind. They knew that 1988 figures were substantially worse than 1987 figures on the audited report prepared by Breeding because in 1988 they knew the company was financially drained and Steve and Mary Beth even had to sell a car to raise quick cash. They knew payables were not $75,000 and that the true payables list was kept off the books. They knew the Centerre and Breeding debts were not business-related. Steve admitted the Centerre debts were for his personal cover. The Breeding itemized bill, not provided to the Gourleys initially, was to the Userys for personal tax advice.

Fifth, the Userys intended for the Gourleys to rely on the statements so they would be persuaded to buy the assets before the homes had to close in three months. Sixth, the court finds the Gourleys were ignorant of the falsity of the statements, and in fact did not fully discover the fraudulent nature of the representations

until some time after closing, such as when they found the hidden records for 1988, when they discovered vendors were applying payments to the Userys, old bills (and taking further steps such as refusing credit or putting the Gourleys on a c.o.d. basis) , and when they received the itemized statement from Breeding.

Seventh, the Gourleys relied on the information to project cash flow and operating expenses to calculate that-they could buy the assets and operate the homes with sufficient cash flow to pay expenses, debt service and the Userys and earn a profit estimated at $500,000 based on the Userys' figures.

Eighth, the Gourleys were entitled to rely on the representations, as will be discussed below, because they were direct, positive representations. The Userys prevented the Gourleys from investigating, forcing them to rely on the Userys' representations by stating that the 1988 reports which the Gourleys wanted to review did not exist and directing the Gourleys to the 1987 reports, which the Userys represented (both to the Gourleys and the appraiser, Mr. Harrison) were substantially the same as 1988. As to the false payables information, the Userys had the true list hidden off the books, so the Gourleys could not have discovered it. It would have been futile to inspect reports filed with the Division of Aging, because they also misrepresented payables. A right to rely is especially appropriate in these circumstances, where the misrepresentations were made in the presence of a well-known and trusted CPA who was on the board of directors, who had been the accountant for years, who had years of knowledge about CHCC's financial data and condition, and who, during meetings, had performed calculations and made additional statements concerning the data. Ninth, conse-

quent injuries were proximately caused to the Gourleys as explained in the fact section on expenses and losses incurred, and as explained below in the damages discussion.

The court finds the Gourleys met all elements, but specific arguments will be addressed. The Userys' argument that the cash flow misrepresentation, even if false, was not material, is rejected.. The cash flow data was necessary for the Gourleys to decide the homes could be operated profitably and without further capital contributions (except the $500,000 credit line to be available if necessary). From the beginning the Userys knew the Gourleys had no operating capital to pay operating expenses, debt service on assumed debt, and payments to the Userys, and that they were relying on cash flow calculations. The court accepts as true Mr. Gourley's testimony that he would not have agreed to pay $8,000,000 for the facilities and to incur an obligation to pay over $34,000 per month for 20 years to the Userys had he known the 1988 performance of the facilities was not substantially the same as 1987 performance, but in fact, was substantially worse. The payables misrepresentation also factors into the cash flow misrepresentations since cash unexpectedly diverted to pay huge delinquent accounts could not be used to cover other expenses. The cash flow misrepresentation was material.

The Userys contend there can be no injury to the Gourleys as a result of the misrepresentation of the accounts payable balance because the bottom line would not change if the net-out had occurred. This assertion is the subject of discussion in the findings of facts. In summary, the misrepresentation was material because payment of $538,419 instead of the expected $75,000

caused vendors to cut off supplies, place the Gourleys on c.o.d., and sue the business. The problems in covering the payables caused the reputation of the nursing homes to suffer as rumors about its condition circulated, and in turn caused problems in maintaining the patient census. Payment of hundreds of thousands of dollars in unexpected payables to hostile suppliers is not the functional equivalent of paying $75,000, even if the bottom line on the ultimate contract price, payable over 20 years, did not change. If the payables and receivables had been as represented, there would have been a net surplus of $175,000 or $200,000 in receivables which would have provided the Gourleys with more cash for transitional operating expenses, which would have been amortized over 20 years instead of turning out as a shortfall of receivables over payables. In any event, the Userys are in no position to complain since there was never a net-out day, as required by the contract, due to the turmoil created by their misrepresentations.

Having to pay the unexpected delinquent payables of $538,419, after planning for $75,000 in current payables and excess Medicaid receivables, changed the basic structure of the agreement from 100% owner-financed to one that in effect required a substantial downpayment (and the bottom line credit for the "down-payment" was not received since the net-out transaction never took place). The Userys knew the Gourleys had no cash with which to make a downpayment or pay wholly unexpected expenses up front. Nevertheless, they placed the Gourleys in a position from which they could not comply with other terms of the Asset Purchase Agreement, such as payments to noteholders who had deeds of trust on the properties, and payments to the Userys. The misrepresentation of accounts payable was material and

the Gourleys were injured. The homes have not recovered from the damage done.

The Userys also contend the additional long-term debt was not material and did not injure the Gourleys because it was credited against the purchase price and did not alter the bottom line. These misrepresentations injured the Gourleys by causing them to pay $128,000 more than they should have to outside creditors. The problem goes beyond the bottom line, which may not have changed. The Gourleys had no control over the demands of outside creditors for immediate payment. For example, Ms. Breeding refused to do any work for the Gourleys on Medicaid Reports, which had to be prepared, and which only she could prepare, until they agreed to pay the Userys' bill or give her a promissory note.

D. Due Diligence

The Userys contend the Gourleys had no right to rely on the representations because Mr. Gourley is an expert in nursing home management and was under a duty to act with due diligence to discover any fraud. "Due diligence" as used here means to "make an investigation into the statements made by sellers." Under Missouri law the most important element is whether the seller positively misstated a fact or merely inadvertently made a false statement. A broad, general rule in Missouri entitles buyers to rely on positive, distinct and definite representations concerning an existing fact. Buyers need not make an inquiry concerning the fact involved. *Goar v. Belinder*, 249 S.W. 977, 980 [7] (Mo. App. 1923); *Flack v. Wahl*, 193 S.W. 56, 58 [1] (Mo. App.) , cert. quashed, State ex rel. *Wahl v. Reynolds*, 199 S.W. 978 (Mo. banc 1917).

If the seller knowingly and deliberately makes a factual statement that is false, and if the statement's falsity is not immediately apparent to the buyer, the buyer may sue for fraudulent misrepresentation. The seller may not defend by asserting the buyer was negligent in not investigating to determine the truthfulness of the statement. This rule is particularly applicable where the seller makes a false statement concerning rents, profits, or income. *Bertram v. Kempster,* 216 S.W.2d 494, 497 [7] (Mo. 1949).

In *Hewlett v. Hewlett,* 845 S.W.2d 717 (Mo. App. 1993), a husband misrepresented the value of his business to his wife during a divorce. *Hewlett* ,845 S.W.2d at 721 [6], cited *Alexander v. Sagehorn,* 600 S.W.2d 198, 201 (Mo. App. 1980), where the

> former wife sought to set aside the decree on grounds of fraud, husband argued that wife had no right to rely upon any representations he made. He said she had ample opportunity to investigate the value, that the parties were adversarial to one another, and that she should not have relied on his statement of value.

Alexander found the wife could rely on the husband's representation because "having been told by someone who purported to know, she relied on that figure." 600 S.W.2d at 201 [6]. *Hewlett*, 845 S.W.2d at 721 [6], condoned this result and found that in a situation where the actual value is not easily attainable, such as an ongoing business, the result is even more proper.

As explained in *Hanson v. Acceptance Finance Co., Inc.*, 270 S.W.2d 143, 149-50 (Mo. App. 1954) (quoting *Wood v. Robertson*, 245 S.W.2d 80, 84 [5] (Mo. 1952)) (emphasis added):

> [T]he courts will not protect those who, with full opportunity to do so, will not protect themselves. But the contrary is true where the alleged fraud-feasor fraudulently induces his adversary to refrain from inquiry as where the fraud-feasor has, or by calculation and artifice obtains, the confidence of the other and causes him to forego the exercise of caution.

Here, the Userys by "calculation and artifice" prevented the Gourleys from engaging in due diligence because they knew that if the Gourleys saw the real figures, they would never purchase the nursing homes. The Gourleys were told that no reliable 1988 records existed so they should look only at the 1987 financial report because it was substantially the same as 1988 performance. The Userys also concealed the true accounts payable list, kept off the books and known only to the owners, the bookkeeper and the accountant. They gave the Gourleys a false payables list maintained on the computer only for external show. Thus, the Userys, misrepresentations extended to false statements about the existence of records. The Gourleys did not have the ability to inspect pertinent records because the very records that could reveal the fraud were affirmatively concealed.

The Userys also contend the Gourleys should have investigated by reviewing reports filed with the Division of Aging. The Gourleys were not obligated to search state records after the positive misrepresentations by the Userys. Even if the Gourleys had searched the state records to verify information, the misrepresentations would have been supported rather than exposed because the Userys also misrepresented financial data in state reports. For example, in the 1988 Financial and

Statistical Report for Nursing Facilities, the Userys misrepresented accounts payable as $86,000 as opposed to the much larger figure hidden off the books.

The Userys perpetrated a two-tiered fraud by concealing the existence of records and then positively representing that 1) cash flow in 1988 was substantially the same as in 1987; 2) accounts payable were $75,000 and current; and 3) assumed debts related to the business. The Gourleys are relieved of any investigative responsibilities due to the positive nature of the fraudulent statements, the concealment of the documents the Gourleys would have reviewed to verify the representations, and the misrepresentations in reports submitted to the state, which would have reinforced the misrepresentations if the reports been reviewed.

In addition, the Userys were anxious to proceed immediately with this substantial contract before the state closed the homes, so they encouraged a quick closing with reliance on their misrepresentations. There was no time for a comprehensive investigation to discover concealed irregularities, and the Gourleys were lulled into proceeding quickly by the positive misstatements, including those about unavailability of records, and the steering toward other, audited records which were supposedly the same.

Furthermore, the Gourleys were encouraged to rely on the positive misstatements by participation at every step of the negotiations and sale by CPA Judy Breeding. The Gourleys trusted her because of 1) her reputation in the nursing home field; 2) the fact that she had done work for Mr. Gourley's business and for him personally in his divorce; and 3) the fact that for many years she had handled all of CHCC's accounting work, including

tax matters and returns, the set-up and audits of the books, issuance of audited financial reports, work on preparation of books and financial reports, and preparation of reports required by the Division of Aging. Due to her long-time accounting services for the corporation and the Userys, and her knowledge of the Userys' actions, such as withdrawing huge amounts of cash to support their lifestyle and invest in other business ventures, Judy Breeding must have known of the irregularities and misstatements. Her silence during positive misstatements of fact would be a powerful incentive to believe the statements-were trustworthy.

E. Damages: Appropriate Measure

There are two remedies and two measures of damages for intentional fraudulent misrepresentations involving a contract for sale of a business or property. The party must choose one remedy, either: 1) choose rescission and recover for what was paid; or 2) affirm the contract and recover for the damages caused by the fraud. *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F.Supp. 1520, 1530 [13] (W.D. Mo. 1992) ; *Harris v. Union Electric Co.*, 766 S.W.2d 80, 86 [1,2] (Mo. banc) , *cert denied*, 492 U.S. 919 (1989) ; *Centerre Bank of Kansas City, N.A. v. Distributors, Inc.*, 705 S.W.2d 42, 51 (Mo. App. 1985). The Gourleys have elected to affirm the purchase agreement and pursue damages for the fraudulent misrepresentations, so the appropriate measure of damages is "benefit of the bargain."

If the chosen remedy is to rescind, the customary measure of damages in Missouri is recovery of out of pocket costs. Out of pocket damages include two components; 1) all money paid to the sellers under the contract, and 2) incidental expenses or special or conse-

quential damages incurred by buyers as a result of entering into the contract. *Fong v. Town & Country Estates, Inc.*, 600 F.2d 179, 182 [2-4] (8th Cir.) *cert denied*, 444 U.S. 942 (1979); *Garnatz v. Stifel, Nicolaus & Co.*, 559 F.2d. 1357, 1360 [1] (8th Cir.), *cert denied*, 435 U.S. 951 (1978) ; *Lollar v A.O. Smith Harvester Products, Inc.*, 795 S.W.2d 441, 451 [10] (Mo. App. 1990).

If the second remedy is chosen, to retain the property and seek damages, in Missouri the measure of damages is generally the benefit of the bargain, which is the difference in the actual value and the price paid (or represented value).[5] However, benefit of the bargain damages also include the second component of additional special or consequential damages, the same as in the out of pocket measure, for the buyer's expenses incurred as a result of the fraudulent misrepresentation. *Blue v. Rose*, 786 F.2d 349, 351-52 (8th Cir. 1986) (benefit of the bargain damages, including the difference in actual value and represented value, plus additional special damages for expenses incurred as a result of the fraudulent transaction, did not constitute an award of both benefit of the bargain and out of pocket damages) ; *Fong v. Town & Country Estates, Inc.*, 600 F.2d 179, 182 [2] n.3 (8th Cir.), *cert denied*, 444 U.S. 942 (1979) (plaintiff can receive as damages the benefit of the bargain, plus additional special damages, which

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[5] In cases where property is retained, if the benefit of the bargain would not accurately or fairly represent the damages, the out of pocket measure can be used. That situation does not exist in this case. *Glass Designs*, 867 F.2d at 1143 (citing *Central Microfilm Serv. Corp. v. Basic / Four Corp.*, 688 F.2d 1206, 1220 [31] (8th Cir.), *cert denied*, 459 U.S. 1204 (1983) and *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281, 285 [2] (8th Cir. 1984)).

altogether might exceed damages pursuant to an out of pocket instruction [emphasis added]); *Miller v. Higgins*, 452 S.W.2d 1211 125 [7] (Mo. 1970) ; *O'Conner v. Follman*, 747 S.W.2d 216, 220 (Mo. App. 1988) ; *Chambers v. McNair*, 692 S.W.2d 320. 325 [5] (Mo. App. 1985) (under benefit of the bargain in a sale, plaintiffs may recover benefit of the bargain damages, plus special damages which are the proximate result of the fraud, and punitive damages); *see also McCall v. Jim Lynch Cadillac, Inc.*, 791 S.W.2d 456, 458 (Mo. App. 1990).

In the oral findings and conclusions made on the record at the end of trial, the damage computations were not clear and the court indicated it would probably use the out of pocket measure. At that time the parties and the court had focused on the additional incidental or special damages allowable under either out of pocket or benefit of the bargain cases. However, after further study of the record and additional research, the court will modify the generalized oral findings on damages. The findings at the end of trial, which remain the same here, provided for the property to be retained by the Gourleys and damages awarded. The itemized damages referenced in the oral findings related only to the special damages component and did not address the basic measure of either out of pocket damages - - the return of all payments made, or benefit of the bargain damages - - the difference in the price paid and the actual value. The court now concludes that the appropriate measure of damages is benefit of the bargain with the addition of special damages for the substantial expenses incurred by the Gourleys as a result of the fraudulent misrepresentations.

The addition of special damages does not result in a partial double damage award, combining aspects of

both benefit of the bargain and out of pocket measures. *Blue v. Rose*, 786 F.2d 349, 351-52 (8th Cir. 1986) (benefit of the bargain damages, including the difference in actual and represented value, plus additional special damages for expenses incurred as a result of the fraudulent transaction, did not constitute an award of both benefit of the bargain and out of pocket damages); *Fong v. Town & Country Estates, Inc.*, 600 F.2d 179, 182 [2] n. 3 (8th Cir.), *cert denied*, 444 U.S. 942 (1979) (plaintiff can receive as damages the benefit of the bargain to which he is entitled, plus additional special damages, which altogether might exceed damages pursuant to an out of pocket instruction [emphasis added]).

Under either measure the second component of special damages may be awarded if such damages are demonstrated. See *Lollar v. A.0. Smith Harvestore Products, Inc.*, 795 S.W.2d 441, 451 [10] (Mo. App. 1990) (stating both measures and including incidental losses for both). The additional damages have been referred to variously as incidental, special, consequential or actual damages, but all refer to damages for expenses incurred by the buyers after entering into the contract. In the present case, the supplemental damage award includes only the additional special damages allowable under either measure, but does not include recovery of any payments made to the Userys. There is no duplication of damages.

F. Damages: Calculation

Under the benefit of the bargain measure, the Gourleys are entitled to the difference in the purchase price (represented value), and the actual value, as of the time of the transaction. The court has adopted the valuation of the Gourleys' expert, and finds that as of the time of

the sale transaction, the purchase price and value were represented as $8,000,000, but the actual value was $5,175,000.

However, a further adjustment is necessary because the contract provided that long-term debt assumed by the Gourleys would be credited to reduce the balance of the note. Thus, both the price paid and the actual value must be reduced by the long-term debt. The long-term debt deducted from the actual value will be $128,000 less than the long-term debt figure used at the time of purchase because two debts were improperly included and those debts will be the subject of special damages, as explained below. Therefore, in order to avoiding including the two debts twice in the damage calculations, they are not included in the revised credit for long-term debt. Other-wise, the Gourleys would get a credit against the balance due and also special damages for the two debts. The long-term debt was $4,158,986.74, less $128,000 in damages to be awarded for the Centerre and Breeding debts, for an adjusted total of $4,030,986.74.

The calculation for the benefit of the bargain damages is:

A.	Purchase price/represented value:	$8,000,000.00
	Less assumed long-term debt:	<4,158,986.74>
	Adjusted price:	$3,841,013.26
B.	Actual value:	$5,175,000.00
	Less Adjusted long-term debt:	<4,030,986.74>
	Actual value after credit:	$1,114,013.26
C.	Adjusted price:	$3,841,013.26
	Less actual value after credit:	<1,114.013.00>
	Benefit of the bargain damages:	$2,697,000.26

In addition to the benefit of the bargain damages of $2,697,000.26, the Gourleys incurred the following special damages which flow from the fraudulent misrepresentations which caused the Gourleys to purchase the assets. These damages are for the payables, additional funds the Gourleys were forced to put into the business to keep it afloat, payment for debts unrelated to the business that the Gourleys were deceived into assuming, and separate payments made to Mary Beth which were not applied to the balance of the Userys' note.

The payables assumed by the Gourleys totaled $538,417.19. There is no reduction for the $75,000 payables as represented, because that amount was supposed to be applied as a reduction of the balance due on the note, but the net-out transaction never took place. The Gourleys and the business were damaged by having to cover the unexpected expenses, so they are entitled to compensation for the actual payables of $538,417.19, less the Medicaid receivables of $236,681.79, resulting in net damages of $301,735.__ directly flowing from the misrepresentation of payables.

The Gourleys assumed debts included in the list of business related debts, but which actually were for the Userys personally. The debts for which the Gourleys should be compensated are: $110,000 for the Centerre Bank loans Steve procured to cover improper withdrawals, and $18,000 for the Userys' personal debt to Judy Breeding. These damages total $128,000.

The Gourleys had to borrow additional funds and infuse their own capital, in the total amount of $1,879,506.85, to cover cash flow shortages and replace the capital drain by the Userys and their companies. In addition, the Gourleys had to pay interest of $428,535.23

on the funds borrowed, and they lost interest of $12,997.83 (at 4%) on funds they contributed, for total interest damages of $441,533.06. The damages for amounts borrowed, personal funds contributed, and interest expenses totals $2,321,039.91. There is no duplication of these damages and the payables damages because there were separate injuries incurred from 1) having to pay the payables and associated collection costs, and suffering damage to the homes' reputations and patient census due to rumors of financial instability, and 2) the additional expenses of having to borrow and contribute even more money to cover all operating expenses, such as payroll, legal costs to attempt to renegotiate terms to mitigate damages, long-term debt, and the Userys, in addition to the undisclosed payables.

The Gourleys should also be compensated for separate payments or loans made to Mary Beth. She was supposed to credit them to the balance of the Userys' note, but did not because she concealed the payments from the other payees. The payments were $23,000.

The damages of $2,697,000.26 for the difference in the actual value and the price paid (value represented), plus special damages totaling $2,773,775.31 result in total damages of $5,470,775.57. This computation permits the Userys to keep payments they received and credited to the note. However, the damages exceed the adjusted amount of the original note, so the note balance must be set-off against the damages. The set-off results in payment in full of the note, and the balance will remain a cash judgment for the Gourleys.

Thus, total damages of $5,470,775.57, less a set-off of $3,841,013.26 for the adjusted note balance after credit for longterm debt, results in remaining damages of

$1,629,762.31. The judgment shall bear interest at the federal statutory rate from the date of entry of this judgment.

This judgment for damages is entered against Mary Beth Usery and her bankruptcy estate, and against Steve Usery because they were officers, directors and primary shareholders of the business, and they made the fraudulent misrepresentations or caused them to be made by employees and agents. A money judgment is not entered against Mr. McLeod, who has not been charged with misrepresentations, but is simply trustee of the two trusts which held shares of CHCC stock. However, as requested in his motion to intervene, he is a party and is therefore bound by the decision entered herein. Mr. McLeod as Trustee is obligated to comply with other provisions of the judgment, such as cooperating in the satisfaction of the note and the release of any security interests, liens or mortgages.

G. Denial of Discharge

The title of the Gourleys' complaint in Adversary No. 92-6034 was "Complaint to Determine Dischargeability of Debt." The complaint, drafted by a lawyer who does not ordinarily practice in bankruptcy court, did not cite a specific Bankruptcy Code section for nondischargeability such as 11 U.S.C. § 5 2 3 (a) (2) (B) , but the Complaint pleaded detailed allegations of fraudulent misrepresentation and the evidence at trial supported such allegations. Mary Beth Usery's answer included specific reference to the "Complaint to Determine Dischargeability of Debt." From review of the Complaint, debtor's answer and the evidence at trial, the court concludes that a defendant/ debtor and her bankruptcy counsel could understand, both from the

title and the allegations, that plaintiffs sought a determination of nondischargeability of any judgment resulting from the Complaint. Such a determination would be a logical and usual form of relief in this type of adversary action.

There was no response by debtor challenging the sufficiency of the allegations for failure to include a specific reference to a dischargeability section of the Code. Fraud was pleaded with particularity and informed the debtor/ defendant of the alleged intentional misrepresentations. Detailed allegations were pleaded and proven at trial concerning fraudulent misrepresentations made in writing and orally by Mary Beth Usery or made by employees or agents acting under her direct supervision and in her presence. For these reasons, the court concludes the "Complaint to Determine Dischargeability of Debt" sufficiently raised the issue. An alternative way to address the matter is to amend the pleading to conform to the evidence at trial. The evidence demonstrated that Mary Beth Usery made fraudulent misrepresentations which met all elements to be nondischargeable.

Every element of § 523 (a) (2) (B) has been satisfied by clear and convincing evidence which, as discussed earlier under the Burden of Proof heading, exceeds the applicable standard of preponderance of the evidence for dischargeability actions. The elements which establish the fraudulent misrepresentations under Missouri law also establish nondischargeability of the judgment under this Bankruptcy Code section. Hartsfield v. Barkley, 856 S.W.2d 342, 347-48 (Mo. App. 1993).

Reviewing the evidence in light of the elements of § 523(a) (2)(B), Mary Beth Usery personally, and through

agents and employees acting in her presence and under her supervision, made statements in writing which 1) were materially false, 2) respecting the debtor's or an insider's financial condition, 3) on which the Gourleys reasonably relied, and 4) which the debtor caused to be made or published with intent to deceive. In regard to the above elements, it is noted that under 11 U.S.C. § 101(31), CHCC corporation, Steve Usery, the two children who were also shareholders or had trusts, and the trusts which received money were all insiders of Mary Beth. The Gourleys filed a proof of claim on March 5, 1992 asserting they were creditors of Mary Beth. In addition to the promissory note and ensuing payments, the Gourleys gave separate loans and payments directly to Mary Beth, totaling $23,000, which were not credited the balance of the note. In addition, she received other funds, property and credit, including the benefits from assumption of the debts which were not business-related and payment of the secret payables. These payments, and the other damages flowing from the fraud, make the Gourleys creditors of Mary Beth and her bankruptcy estate.

Specific misrepresentations in writing on which the Gourleys reasonably relied include the financial documents which were part of the misrepresentations that 1988 cash flow was the same as in 1987; the false payables list; and the list of debts to be assumed, which misrepresented that all the debts were business-related.

VII. CONCLUSION

The Gourleys met their burden of proof . The Userys are liable for three material fraudulent misrepresentations on which the Gourleys reasonably relied in the

purchase of the CHCC assets. Mr. Gourley was entitled to rely on the Userys' positive misrepresentations, especially in these circumstances where they said 1988 financial records did not exist, they hid the true payables list, reports to the Division of Aging contained similar misrepresentations, and the Userys pushed for an immediate contract and closing on a complex transaction because of the approaching revocation of their license. Despite his experience as a nursing home manager, it would have been impossible for Gourley to accurately determine the value, cash flow or other financial conditions of the business due to the positive misrepresentations. The Gourleys were damaged by the intentional and material fraudulent misrepresentations, and as to debtor Mary Beth Usery, the judgment entered herein should not be discharged in the Chapter 7 bankruptcy case.

Accordingly, it is ORDERED, ADJUDGED AND DECREED as follows:

1. In Adversary No. 92-6038, judgment is entered in favor of the defendants Ewing B. Gourley, Carol L. Gourley, E.B.G. Healthcare III, Inc., E.B.G. Healthcare IV, Inc., Healthcare Retirement Village, Inc. and Healthcare Laundry Services, Inc. , and against plaintiffs Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, Steven Usery, James McLeod, Trustee of the Shawn Usery Trust and the Stephanie Usery Trust, and William Hart, Trustee Under Certain Deeds of Trust.

2. In Adversary No. 92-6034 defendant Mark Gardner is dismissed.

3. In Adversary No. 92-6034, judgment is entered in favor of plaintiffs Ewing Gourley, Carol Gourley and the

companies, and against defendants Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, and Steven N. Usery, as stated below. In Adversary No. 92-6038, judgment is entered in favor of defendants Gourley and against plaintiffs Mary Beth Usery, her bankruptcy estate and Steven N. Usery, as stated below.

A. Judgment is entered for damages in the total amount of $5,470,775.57.

B. The damages shall be reduced by a set-off of $3,841,013.26 as payment in full and satisfaction of the promissory note, executed by plaintiffs Gourley pursuant to the contract for purchase of assets in 1989. After the setoff, the balance of damages shall remain as a money judgment.

C. All defendants in Adversary No. 92-6034 and all plaintiffs in Adversary No. 92-6038 are ordered to deliver to the Gourleys the note, marked "paid", and to release all deeds of trust, mortgages, liens or other security interests on property of the plaintiffs in Adversary No. 92-6034 and the defendants in Adversary No. 92-6038, all within 10 days of the date of entry of this judgment. If the Userys and the other plaintiffs in Adversary No. 92-6038 fail or refuse to deliver the note and release all security interests within 10 days, as directed herein, then this judgment may be recorded where appropriate and shall be deemed a satisfaction of the note and a release of all deeds of trust, mortgages, other security interests or liens as described herein.

D . The damages in the amount of $5,470,775.57 shall accrue interest at the federal statutory rate from the date of entry of this judgment until the note is marked as paid and returned to the makers,

and the deeds of trust, mortgages, other security interests or liens described herein are released, or the note and security instruments are deemed satisfied and released by recording of this judgment.

E. After the set-off has been effectuated by satisfaction of the note and release of the security instruments as described herein, the balance of the damages shall accrue interest at the federal statutory rate.

F. A judgment for costs is entered against defendants Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 9260255, and Steven Usery in Adversary No. 92-6034, and against plaintiffs Mary Beth Usery, Steven Usery and the Shawn Usery Trust and the Stephanie Usery Trust, but not against Trustee James McLeod personally, in Adversary No. 92-6038. Since the trials in the two adversary proceedings were consolidated, and the issues were the same in each case, the costs are not allocated to either case, but may he satisfied in either case from any of the parties named herein.

4. Pursuant to 11 U. S. C. § 5 2 3 (a) (2) (B), the judgment against debtor Mary Beth Usery shall not be discharged in the bankruptcy proceeding.

/s/ Karen M. See
Karen M. See, Bankruptcy Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

MARY BETH USERY, et al.,
Plaintiffs,
vs.
EWING B. GOURLEY, et al.,
Defendants.

Case No. 95-3328-CV-S-3
FILED August 27, 1996

ORDER

The Court has reviewed the Bankruptcy Court's opinion in this case, the voluminous record, and the parties' briefs. The Court concludes that the Bankruptcy Court's findings of fact are not clearly erroneous.[1] Further, after conducting a de novo review, the Court has determined that the Bankruptcy Court's legal conclusions were correct and that the law was properly applied to the facts as found by the Bankruptcy Court.

The trial in this case spanned several weeks, and the Bankruptcy Court has authored a well-written, comprehensive sixty-two page opinion. The Court discerns no reason to author an independent document chronicling the facts and issues involved in this case. Accordingly, the Court adopts the Bankruptcy Court's April 15, 1995 opinion and hereby AFFIRMS the decision reflected therein.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 8/27/96

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[1] This is not to say that 100% of the testimony is consistent with the Bankruptcy Court's findings. However, this is not required; it is rare that *all* of the evidence points one way, and this failing does not require reversal of the Bankruptcy Court.

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-4043

In re: Mary Beth Usery,
Debtor.

Ewing B. Gourley; Carol L. Gourley,
Plaintiffs-Appellees,
v.
Mary Beth Usery; Steven Usery; James McLeod,
Trustee,
Defendants-Appellants,

Fred C. Moon, Trustee of the Estate of
Mary Beth Usery,
Appellant.

Mary Beth Usery; Steven Usery; James McLeod,
Trustee of the Shawn Usery Trust and the
Stephanie Usery Trust,
Plaintiffs-Appellants,

William Hart, Trustee Under Certain
Deeds of Trust,
Plaintiff,
vs.
Ewing B. Gourley; Carol L. Gourley,
E.B.G. Health Care III, Inc.;
E.B.G. Health Care IV, Inc; Health Care Retirement
Village, Inc.; Health Care Laundry Services, Inc.
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

95-3328 CV-S-3
Document #17

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part, and remanded to the district court for proceedings consistent with the opinion of this court.

August 22, 1997

A true copy.

ATTEST:

/s/ Michael E. Gens

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-4043

In re: Mary Beth Usery, Debtor.

Ewing B. Gourley; Carol L. Gourley,
Plaintiffs-Appellees,
v.
Mary Beth Usery; Steven Usery; James McLeod,
Trustee,
Defendants-Appellants,

Fred C. Moon, Trustee of the Estate of
Mary Beth Usery,
Appellant.

Mary Beth Usery; Steven Usery; James McLeod,
Trustee of the Shawn Usery Trust and the
Stephanie Usery Trust,
Plaintiffs -Appellants,

William Hart, Trustee Under Certain Deeds of Trust,
Plaintiff,
v.
Ewing B. Gourley; Carol L. Gourley;
E.B.G. Health Care III, Inc.;
E.B.G. Health Care IV, Inc.; Health Care Retirement
Village, Inc.; Health Care Laundry Services, Inc.,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Missouri.
Submitted: June 9, 1997
Filed: August 22, 1997

Before BOWMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and KYLE,[1] District Judge.

BOWMAN, Circuit Judge.

This adversary proceeding arises out of a nursing home sale tainted by fraud. The Bankruptcy Court awarded the purchasers, Ewing and Carol Gourley, more than $5.4 million in damages resulting from the fraudulent representations of the sellers, Mary Beth and Steven Usery. The Userys appealed to the District Court, which affirmed. We now affirm as to liability but reverse and remand for a new trial on damages.

I.

In 1988, Mary Beth Usery owned a majority interest in Central Health Care Centers, Inc, (CHCC). The remaining equity in the company was owned by Mary Beth's then-husband Steven and by trusts benefitting their children. Through CHCC, the Userys owned and operated two nursing homes in Springfield, Missouri, known as Northside Nursing Center (Northside) and Ozark Nursing and Care Center (Ozark); an apartment complex; and a laundry facility. The Userys had operated the nursing homes profitably for a number of years and had withdrawn large amounts of cash from CHCC to support their lavish lifestyle. Steven's management of the homes, and particularly his reduction in staffing levels in 1987, eventually caused trouble: a March 1988 inspection of Northside by the Missouri Division of Aging revealed serious deficiencies in patient care, and CHCC had to enter into a consent agreement with the Division in order to retain its license. The agreement

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota, sitting by designation.

froze Medicaid admissions, required Northside to increase staffing levels, and gave the home until July 1989 to fix its problems or shut down.

In late 1988, the Userys, who were beginning divorce proceedings, decided to sell the homes rather than attempt to continue operating them. Through their accountant, Judy Breeding (who was also a director of CHCC), they met Ewing Gourley, who was well-known in Missouri as a successful manager of nursing homes. Breeding had done accounting work for Gourley in his business and in his then pending divorce. Gourley eventually expressed interest in leasing the nursing homes from CHCC with an option to purchase, but Mary Beth insisted on selling the properties outright.

At a key meeting on March 10, 1989, the deal came together. Gourley explained to the Userys that his assets were tied up because of continuing litigation relating to his divorce. *See Gourley v. Gourley (In re Marriage of Gourley)*, 811 S.W.2d 13 (Mo. Ct. App. 1991). He emphasized that he could afford to buy the homes only if they produced sufficient cash flow to allow him to service existing debt and to pay the Userys for the sale. The Userys and Breeding (who is not a party to this case) assured Gourley that, even though 1988 financial results were not yet available, the homes' cash flow in 1988 was substantially the same as the 1987 cash flow, which the Userys and Breeding calculated to be approximately $960,000 after service of existing debt. In fact, the Userys had preliminary 1988 financial records available at the time that showed a significantly lower cash flow. Gourley later discovered these records in a cardboard box at Northside.

As the parties began to structure their deal, the Userys made two other significant misrepresentations. When Gourley inquired about accounts payable, he was told that they totaled about $75,000 and were current. After the sale, Gourley discovered that the Userys had been keeping two sets of books and that payables actually exceeded $500,000, Including many delinquent accounts. The resulting drain on cash was exacerbated by Mary Beth's insistence, before the closing, on drawing down half of a $500,000 line of credit established especially for the transition. The Userys also represented that all of the long-term debt that Gourley agreed to assume was business-related debt. In fact, the long-term debt included loans totaling $110,000 that Steven had obtained through CHCC for personal purposes, as well as a debt of $18,000 owed by the Userys to Breeding for personal tax advice.

Based on the Userys' representations, Gourley and his new wife, Carol, agreed to purchase Northside, Ozark, the apartments, and the laundry facility for a total price of $8 million. The Gourleys assumed $4.1 million in long-term debt of CHCC, and they gave the Userys a note, payable over twenty years, for the balance. As the deal was structured, the amount of the note was to be adjusted after the closing to account for the difference between payables and Medicaid receivables, but this "net-out" transaction never took place. Although the Gourleys were able to Let Northside out from under the consent agreement with the state, they ran into operational difficulties immediately after taking over the homes, and they had to invest substantial amounts of their own money in order to keep the businesses afloat. After a series of negotiations between the parties failed, the Gourleys stopped making payments

on the note because of a shortage of cash.[2] Because the note was Mary Beth's primary source of income, she filed for Chapter 11 bankruptcy in February 1992.

In bankruptcy court, the Gourleys filed an adversary proceeding against the Userys, alleging that the Userys' fraud rendered the note void and unenforceable. Mary Beth filed an adversary proceeding against the Gourleys to collect the balance due on the note; Steven and the trustee of the Usery children's trusts intervened and joined in Mary Beth's complaint. The Bankruptcy Court consolidated the actions and conducted a bench trial, none of the parties having demanded a jury. After a thirteen-day trial, the Court announced findings and conclusions from the bench, ruling in favor of the Gourleys and awarding approximately $2.2 million in damages, subject to further calculations. At the same time, the court converted Mary Beth's bankruptcy to a Chapter 7 liquidation.

More than two years later, the court filed a written memorandum opinion awarding the Gourleys more than $5.4 million in damages. The primary reason for the increase in damages over the original figure was the inclusion in the final judgment of general damages for the misrepresentation of the cash flow, discussed in more detail later in this opinion. Because the Gourleys' damages exceeded the balance of the note, the Court declared the note satisfied and entered the excess as a judgment against the Userys. The court also denied Mary Beth a discharge of her debt to the Gourleys.

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[2] At one point, the Gourleys paid Mary Beth $23,000 over and above the amount then due because she claimed she needed cash. Although she promised to credit this amount against the balance of the note, she never did.

The Userys, joined by the trustee of Mary Beth's bankruptcy estate, appealed to the District Court, which affirmed.

II.

As the second court of appeal in a bankruptcy case, we apply the same standard of review as the District Court, reviewing the Bankruptcy Court's legal conclusions de novo and its findings of fact for clear error. *See First Nat'l Bank v. Pontow*, 111 F.3d 604, 609 (8th Cir. 1997); *Hold-Trade Int'l, Inc. V. Adams Bank & Trust (In re Quality Processing, Inc.)*, 9 F.3d 1360, 1363 (8th Cir. 1993). Reversal is appropriate if the Bankruptcy Court misunderstood or misapplied the law. *See Nangle v. Lauer (In re Lauer)*, 98 F.3d 378, 383-85 (8th Cir. 1996); *Hold-Trade Int'l*, 9 F.3d at 1364-66.

III.

The Userys first take issue with the Bankruptcy Court's findings that they defrauded the Gourleys. The court found specifically that the Userys made three material misrepresentations; as explained above, these misstatements concerned cash flow, accounts payable, and the relationship of the debts assumed to the businesses the Gourleys purchased.

The parties agree that Missouri law applies to this case. A claim of fraud under Missouri law requires the plaintiff to show nine elements:

> 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity, or his ignorance of its truth; 5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; 6) the hearer's ignorance of the falsity of the representation; 7) the hearer's

reliance on the representation being true; 8) his right to rely thereon and, 9) the hearer's consequent and proximately caused injury.

Heberer v. Shell Oil. Co., 744 S.W.2d 441, 443 (Mo. 1988) (en banc). We are satisfied that the Bankruptcy Court's findings of fact on the issue of liability are not clearly erroneous, and we have no quarrel with the court's legal conclusions on this issue. Because a detailed discussion will add little to the body of Missouri law on fraud, we affirm as to liability on the basis of the Bankruptcy Court's thorough and well-reasoned opinion.[3]

IV.

As to the calculation of damages, however, we believe that the Bankruptcy Court erred in several respects. We consider general damages first, followed by particular items of special damages.

A.

In Missouri, a victim of fraud has two options: rescission of the transaction, which permits the victim to return any benefits received from and to recover benefits conferred on the perpetrator, or affirmance of the transaction, which permits the victim to recover damages. *See Rosenblum v. Jacks or Better of Am. W. Inc.*, 745 S.W.2d 754, 764 (Mo. Ct. App. 1988). The Gourleys have chosen the latter option. In such a case, damages are measured by the "benefit of the bargain" rule, which allows the victim to recover "the difference between the actual value of the property and what its value would have been if [the property] had been as represented."

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[3] We also reject without further discussion the Userys' argument that the Gourleys waived their fraud claim.

Heberer, 744 S.W.2d at 443. Courts have articulated this standard in slightly varying language. See *Blue v. Rose*, 786 F.2d 349, 352 (8th Cir. 1986) (applying Missouri law) ("the difference between the actual value of the purchased property and its value had it been as represented"); *Rosenblum*, 745 S.W.2d at 764 ("the difference in value between what [the victim] actually received and what he would have received had there been no fraud"). Regardless of the particular wording, however, the purpose of the rule is to compensate the victim for the harm caused by the defendant's fraudulent representations. See Heberer, 744 S.W.2d at 443-44. Damages are measured as of the time of the transaction. See *Auffenberg v. Hafley*, 457 S.W.2d 929, 937 (Mo. Ct. App. 1970).

The Bankruptcy Court adopted the testimony of the Gourleys' expert as to the actual value of the nursing homes. That expert determined a value for each home by applying a capitalization rate (16.9% for Ozark, 18.7% for Northside because of the increased risk posed by the consent agreement) to each home's average cash flow for the years 1985, 1986, and 1988. The abnormally large cash flow in 1987 was excluded as not representative of the performance of the homes. Using this method, the expert determined that the two homes together were worth $5,175,000 at the time of the sale. The Bankruptcy Court then subtracted this figure from the purchase price of $8 million and determined that the Gourleys' general damages were $2,825,000.

We perceive two errors in the Bankruptcy Court's calculation. First, the court neglected to account for the apartment complex and the laundry facility, which were included in the $8 million total price but not in the expert's valuation. This omission resulted in an over-

statement of damages by perhaps $800,000 (a figure used by Gourley in his testimony regarding the value of the apartment complex and the laundry facility). Second, and more fundamentally, the court confused the Gourleys *price* actually paid for the Userys' businesses ($8 million) with the *value* those businesses would have had if the Userys' representations had been true (an amount that we cannot determine definitively on appeal, but that is probably less than $8 million). Because a purchaser may pay more or less for a business than the business is actually worth (and more or less than the business would be worth if the seller's fraudulent statements were true), the sale price is not necessarily equivalent to the value of the business "had it been as represented." *Blue*, 786 F.2d at 352. The Gourleys undoubtedly paid more for the nursing homes than the homes were worth, but the record and the testimony of the Gourleys' own expert suggest that they did so for two reasons: the Userys' misrepresentations and the Gourleys' bad judgment. The purpose of a fraud lawsuit is to compensate the victim for the effects of the defendant's misrepresentations, not to save the victim from his or her own unwarranted optimism about the viability of a business. If, for example, the Gourleys had agreed to pay $18 million for the businesses because they believed that they could make phenomenal profits, they would have lost $10 million more than they actually did, but they would not be entitled to collect an additional $10 million from the Userys. The extra $10 million would have been a product of the Gourleys' folly, not a consequence of the Userys' fraud.

Principles of causation and damages are equally relevant in this situation. Any harm resulting from expectations that are overly optimistic even in light of the

defendant's fraudulent statements is not a "natural and probable consequence" of the defendant's fraud. *Heberer*, 744 S.W.2d at 444. Similarly, the goal of the benefit-of-the bargain rule is to restore the plaintiff to the position in which he or she would have been in the absence of fraud. If the bargain would have been unprofitable even in the absence of fraud, the plaintiff must accept the bad bargain or else sue for rescission instead of damages. For these reasons, the benefit-of-the-bargain rule focuses on the value of the property as represented and its actual value, and the courts generally disregard the contract price. See *DeBow v. Higgins*, 425 S.W.2d 135, 142-43 (Mo. 1968) (accepting expert's valuation of property as represented as $32,600 - - less than purchase price - - but remanding for new trial because of uncertainty as to actual value); *Klecker v. Sutton*, 523 S.W.2d 558, 564 (Mo. Ct. App. 1975 recognizing that nothing in record supported plaintiffs theory that sale price was equivalent to value of property as represented).

On occasion, Missouri courts will use the contract price as a proxy for the value of the property as represented, at least where no other evidence of value is presented. *See, e.g., Smith v. Tracy*, 372 S.W.2d 925, 939 (Mo. 1963). This method of calculation is inappropriate in the instant case, however, because the $8 million and $5,175,000 figures reflect different assumptions. In valuing a business, it is customary to extrapolate from income figures to a valuation figure by using a capitalization rate reflecting the risk inherent in the market

and the business.[4] As we have noted, the Gourleys' expert did Just this to calculate the actual value of the nursing homes; his capitalization rates were 16.9% and 18.7%. But if we examine the $8 million purchase price in light of the cash flow figures as the Gourleys believed them to be (i.e., the fraudulent fig-tires), the purchase price reflects an effective capitalization rate of approximately 12% for the whole package. A factfinder cannot compare figures derived from different capitalization rates (and therefore different risk assumptions) to determine the damages attributable to fraud, because part of the difference will be due to the change in risk perception and not due to the fraud at all.

On remand, the Bankruptcy Court must determine the difference between the actual value of the nursing homes and the value of the homes as represented, using the same capitalization rate for each part of the equation In other words, the court must use the same process to calculate both valuation figures, changing 'no, only the cash-flow 91 numbers. Because valuation is a subjective art, we are unable to make a specific finding as to damages on appeal, but we note that each of the illustrative calculations we have undertaken, including the example presented *in the Userys' reply brief, has yielded benefit-of-the-bargain damages of less than $600,000.

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[4] We reject as frivolous the Userys' argument that the contract represented only a sale of assets and not a sale of ongoing businesses. Regardless of the caption of the agreement, it is clear from the content that the Gourleys were purchasing the businesses as going concerns. See *Chambers v. McNair* 692 S.W.2d 320, 323-24 (Mo. Ct. App. 1985) (interpreting contract for sale of inventory and fixtures as contract for sale of business).

B.

The Bankruptcy Court also awarded damages flowing directly from the Userys' other misrepresentations, those concerning accounts payable and the source of the debts assumed by the Gourleys.

The court calculated that accounts payable totaled $538,417.19, not $75,000, as the Userys had represented. The Userys have given us no reason to question the District Court's calculation. The court properly awarded the Gourleys the difference between the actual accounts payable and the Medicare receivables (which were $236,681.79), for net damages of $301,735.40. Contrary to the Userys' arguments, they are not entitled to a credit of $75,000 against this figure. It is true that the Userys disclosed that the homes were carrying $75,000 in payables, and so this amount is not, strictly speaking, damages caused by fraud. Nevertheless, the Userys agreed to net out the receivables and payables after the sale, and they never did so. If the Userys wish the court to enforce their contractual right to the benefit of the Medicare receivables, they must permit the Gourleys to recover the amount to which they are contractually entitled. The Bankruptcy Court's award of the net payables to the Gourleys was not clearly erroneous.

We are less comfortable with the court's award of damages in the amount of the non-business-related debts assumed by the Gourleys. With regard to the $110,000 in loans taken out by Steven Usery for personal reasons, we note that these loans were disclosed clearly in the purchase agreement as debts to be assumed by the Gourleys. The Gourleys therefore received a credit of $10,000 against their note to the Userys in

exchange for assuming these loans. If the Gourleys had known that these loans were not business-related, we have no doubt that they would not have assumed the loans. In that case, however, the Gourleys would have owed the Userys an additional $10,000 on the purchase-money note, because they had already agreed to pay a total of $8 million for the businesses. The Gourleys' damages thus were not $110,000, because the Gourleys would have owed someone $110,000 in any event. Rather, their damages must be measured by the difference between the cost of paying the bank $110,000 according to the terms of the loans and the cost of paying the Userys $110,000 over the twenty-year term of the purchase-money note. Accordingly, the Bankruptcy Court's award of $110,000 in damages was clearly erroneous.

We are unsure how to handle the $18,000 debt owed to Breeding that the Gourleys unwittingly assumed, because we are unable to uncover any evidence of this debt in the record, and the parties have done nothing to assist us in doing so. The debt is not apparent among those specifically assumed by the Gourleys in the sale agreement, and if it is among the accounts payable, the Gourleys have received damages for it already. If, as the Bankruptcy Court's memorandum opinion seems to suggest, the Breeding debt surfaced after the sale and the Gourleys felt compelled to acknowledge the debt because they required Breeding's accounting services, it is not at all clear that the Gourleys' recourse is properly against the Userys. Without any assistance from the parties, we are unable to reach a more definite conclusion, and so we leave this issue for the court's further consideration on remand.

C.

Finally, we consider the Bankruptcy Court's award of special damages. Under Missouri law, "[a] defrauded party may recover special damages necessarily incurred solely by reason of the fraud." *Miller v. Higgins*, 452 S.W.2d 121, 125, (Mo. 1970). Special damages (in contract terms, incidental and consequential damages) are awarded in addition to benefit-of-the-bargain damages. *See Blue*, 786 F.2d at 352; *Chambers*, 692 S.W.2d at 325.

Most of the $2.3 million in consequential damages awarded by the court related to additional funds that the Gourleys had to plow into the businesses to keep them viable. The Gourleys set up each of the businesses in corporate form, and the corporations took out hundreds of thousands of dollars in loans, secured by personal guaranties from the Gourleys. The Gourleys, as shareholders, also loaned significant amounts to the corporations. The Bankruptcy Court's award of special damages included four components: the principal amounts of the bank loans and shareholder loans (about $1.8 million), interest paid on the bank loans (about $430,000), interest foregone on the shareholder loans (about $12,000), and the money the Gourleys paid to Mary Beth that never was credited against the note ($23,000).

As the Userys argue, the causation issue we have discussed previously with respect to the benefit-of-the-bargain damages also affects consequential damages. Special damages are recoverable only if they are "incurred solely by reason of the fraud." *Miller*, 452 S.W.2d at 125. As with general damages, it appears that some of the Gourleys' need for additional capital was caused by the Userys' misrepresentations and some was caused

by the Gourleys' overly optimistic projections of what they could do with the nursing homes. We have no basis for resolving this difficulty on appeal, and so this issue also must be considered on remand.

The Userys argue further that some of the loans included in the award of special damages are double-counted because these loans in reality were obtained only to refinance the loans the Gourleys assumed as part of the purchase or to pay off other loans that also have been counted as special damages. The Userys may well be correct, though the record on appeal leaves us somewhat less than certain.[5] We are more concerned, however, with another form of double-counting that surfaces occasionally among the Userys' arguments: the special damages appear to cover much of the same ground as the benefit-of-the-bargain damages for the cash-flow misrepresentation. The Gourleys' theory of special damages was that they had to invest large amounts of money in order to make the businesses profitable, as the Userys represented they were. The purpose of the benefit-of-the-bargain damages, however, is also to ensure that the Gourleys get businesses that are as valuable as the Userys stated they were. The Gourleys cannot recover for what is essentially the same loss under two different theories; general damages and special damages must represent distinct injuries. *See,*

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[5] The Gourleys' attempt to support the award of special damages by means of alternative calculations is nearly incomprehensible and is based on numerous exhibits that the Gourleys have not included in the appellate record. We therefore find the argument particularly unpersuasive, and we leave this double-counting argument as yet another issue for plenary consideration on remand.

e.g., *Blue*, 786 F.2d at 352 (allowing difference between represented value and actual value of cattle as general damages, and costs related to purchasing and caring for cattle until resale as special damages); *Miller*, 452 S.W.2d at 124-25 (allowing difference between represented value and actual value of stock as general damages, and prepayment penalties, attorney fees, and refinancing expenses as special damages); *Hanes v. Twin Gable Farm. Inc.*, 714 S.W.2d 667, 668-72 (Mo. Ct. App. 1986) (allowing difference between represented value and actual value of bull as general damages, and loss resulting from bull's failure to beget calves as consequential damages). On remand, the Bankruptcy Court should give due regard to limiting the Gourleys to only a single recovery for the cash-flow misrepresentation.[6]

We need not consider the Userys' claim that the Gourleys may not recover special damages that arose after the Gourleys discovered the fraud. It is not clear that Missouri bars the recovery of special damages arising after the victim discovers he or she has been defrauded, the only support for such a rule coming in unexplained comments of the Missouri Court of Appeals some years ago. See *Salmon v. Brookshire*, 301 S.W.2d 48, 56 (Mo. Ct. App. 1957) (opinion on motion for rehearing) ("This record does not contain any evidence of special damages, not speculative in nature, that

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[6] We take care to point out that the Userys' misrepresentation regarding accounts payable may be a proper subject of special damages. It is clear from the record that the large total of undisclosed overdue payables hampered the Gourleys' operation of the homes significantly by draining the homes of cash necessary for operations. Any such losses proved by the Gourleys on remand would be recoverable as special damages.

occurred prior to plaintiff's discovery of the alleged fraud and which would be the proper basis of an instruction . . . ."); *Blackmore v. Sisson,* 139 S.W. 2d 1084, 1096 (Mo. Ct. App. 1940) ("In fraud cases computation of damages is as a rule fixed as of the date fraud is discovered."). Even in states where it is settled that the law prohibits recovery of consequential damages arising after the fraud is discovered, the theory is that a party to an executory contract who discovers fraud may not go forward and compound the damages, but instead must terminate the relationship and sue for damages at that point. *See Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 184 (8th Cir. 1971) (applying Minnesota law).[7] Where termination would be "economically unreasonable," the victim may be able to recover further damages. *Id.* It is enough for present purposes that we recognize that it is not clear from the record whether the Gourleys would have been able to rescind the agreement fully once they discovered the fraud, because the Gourleys had assumed the Userys' loans and had undertaken other commitments to other lenders and the state. In any event, it may turn out that when the Bankruptcy Court recalculates special damages, none of the damages properly recoverable will be damages arising after the fraud was discovered, and the issue will be moot. If the issue remains live on remand, the Bankruptcy Court will be in the best position to apply Missouri law to the facts.

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[7] The Userys' citation of Clements as though it were a case applying Missouri law is not well taken.

V.

Because of several errors in the calculation of damages, a new trial limited to the issue of damages is required. The judgment of the District Court is affirmed as to liability and reversed as to damages, and the case is remanded with instructions to remand to the Bankruptcy Court for further proceedings in accordance with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

In re:
MARY BETH USERY

EWING AND CAROL GOURLEY
Plaintiffs
VS.
MARY BETH AND STEVE USERY, ET AL
Defendants

MARY BETH USERY,
Plaintiff
VS.
EWING AND CAROL GOURLEY, ET AL
Defendants

Case No. 92-60255-KMS
Adv. No. 92-6034-KMS
Adv. No. 92-6038-KMS

JUDGMENT

[X] The issues of this proceeding having been duly considered by the Honorable KAREN M. SEE, United States Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED as follows:

1. The judgment previously entered by the bankruptcy court shall be amended as follows in regard to damages.

2. In Adversary No. 92-6038, judgment is entered in favor of the defendants Ewing B. Gourley, Carol L. Gourley, E. B. G. Healthcare III, Inc., E. B. G. Healthcare IV, Inc., Healthcare Retirement Village, Inc. and Healthcare Laundry Services, Inc., and against plaintiffs Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, Steven Usery, James McLeod, Trustee of the Shawn Usery Trust and the Stephanie Usery Trust, and William Hart, Trustee under Certain Deeds of Trust.

3. In Adversary No. 92-6034, judgment is entered in favor of plaintiffs Ewing Gourley and Carol Gourley and against defendants Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, and Steven N. Usery, as follows:

4. In both Adversary Nos. 92-6034 and 92-6038, the following judgment is entered:

A. Judgment is entered for damages in the total amount of $2,581,752.40 in favor of the plaintiffs, the Gourleys and their associated corporations, with interest at the Missouri legal rate and the judgment shall be set-off against the obligation owed by the Gourleys to the defendants Usery as follows.

B. The $8,000,000 note obligation shall be reduced by $4,158,986.74 in long term debt assumed by the Gourleys, and $796,514.13 for payments previously paid by the Gourleys to the Usery, leaving a balance of $3,044,499.13, which amount shall be entered as a judgment in favor of defendants Fred Charles Moon, bankruptcy trustee in the bankruptcy estate of Mary Beth Usery in Bankruptcy Case No. 92-60255, and Steven Usery.

C. The money judgments of the plaintiffs Gourley shall be set-off against the money judgment of the defendants Usery, for a final judgment in favor of defendants Fred Charles Moon, bankruptcy trustee in the bankruptcy estate of Mary Beth Usery in Bankruptcy Case No. 92-60255 and Steven N. Usery $462, 746.13, with interest accruing from the date of judgment herein at the Missouri legal rate.

D. A judgment for costs is entered against defendants Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, and Steven Usery in Adversary No. 92-6034, and against plaintiffs Mary Beth Usery, Steven Usery and the Shawn Usery Trust and the Stephanie Usery Trust, but not against Trustee James McLeod personally, in Adversary No. 92-6038. Since the trials in the two adversary proceedings were consolidated, and the issues were the same in each case, the costs are not allocated to either case, but may be satisfied in either case from any of the parties named herein.

5. Pursuant to 11 U.S.C. Section 523(a)(2)(B), the judgment against debtor Mary Beth Usery shall not be discharged in the bankruptcy proceeding.

6. Defendants Usery and the bankruptcy trustee shall be stayed from execution pending any appeal of this order and judgment without the filing of a supersedeas bond by the Gourleys.

ROBERT F. CONNOR
Clerk of Bankruptcy Court
By: /s/ Jamie D. Hinkle
Deputy Clerk

Date of issuance: 1/29/99

Copy:

Mark Gardner
Devon Sherwood
Fred Moon

Judgment entered 2/2/99

Adv. Case No. 92-6038 Document #137

Bankr. Case No. 92-60255 Document #323

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

IN RE: MARY BETH USERY,
Debtor.

EWING B.. GOURLEY and CAROL L. GOURLEY,
Plaintiffs,
vs.
MARY BETH USERY, STEVEN USERY and
MARK GARDNER, Trustee,
Defendants.

MARY BETH USERY, STEVEN USERY,
JAMES McLEOD, Trustee of the Shawn Usery Trust
and the Stephanie Usery Trust and WILLIAM HART,
Trustee Under Certain Deeds of Trust,
Plaintiffs,
vs.
EWING B. GOURLEY, CAROL L. GOURLEY,
E.B.G. HEALTHCARE III, INC.,
E.B.G. HEALTHCARE IV, INC.,
HEALTHCARE RETIREMENT VILLAGE, INC. and
HEALTHCARE LAUNDRY SERVICES, INC.,
Defendants.

Bankruptcy No. 92-6025
Adversary No. 92-6034
Adversary No. 92-6038 FILED January 29, 1999

ORDER

In these two adversary actions, which were consolidated for trial and appeal, the Eighth Circuit Court of

Appeals affirmed the bankruptcy court's decision on all issues of liability and remanded for retrial on the calculation of damages only.[1] On remand, the parties agreed to submit the matter on the existing record followed by briefs.[2] Accordingly, the bankruptcy court enters the following findings and conclusions after review of the decision of the Eighth Circuit Court of Appeals; the trial record, including the portions specified by each party in the Joint Pretrial Statement filed December 9, 1998; the parties' briefs, filed December 22 and 23, 1998; portions of the appellate briefs specified by the parties; the bankruptcy court main files and adversary files herein, of which the court takes judicial notice (as it did in the original trial); letters to the court, described in footnote 2; and the court's notes taken during the first trial.

I. GENERAL DAMAGES

The Eighth Circuit affirmed the use of benefit of the bargain damages. However, the appellate court also concluded that in calculating the benefit of the bargain damages, the bankruptcy court used the purchase price of $8 million dollars as opposed to the actual value at the time of the transaction, and that use of the price was error. The Eighth Circuit directed that on remand, the benefit of the bargain damages required findings, as of

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[1] *Gourley v. Usery (In re Mary Beth Usery)*, 123 F.3d 1089 (8th Cir. 1997).

[2] See the parties' Joint Response To Pretrial Order, filed December 9, 1998; two letters from Mr. Sherwood , counsel for the Gourleys, to the court, dated December 4 and December 23, 1998; three letters from Mr. Gardner, counsel for the Userys, to the court, two dated December 8, and one dated December 11, 1998; and the parties briefs, filed on or about December 22 and 23, 1998. All of these documents, including the letters, are made a part of the record herein.

the time of the sale transaction, on the value of the business as represented and on its actual value. The Eighth Circuit held that the same capitalization rate should be used for both the represented value and the actual value. The Eighth Circuit noted that "[o]n occasion, Missouri courts will use the contract price as a proxy for the value of the property as represented, at least where no other evidence of value is presented," *citing Smith v. Tracy*, 372 SW2d 925, 939 (Mo. 1963). However, the Eighth Circuit went on to explain that use of the price was inappropriate in the instant case because the actual value determined by the Gourleys' expert and adopted by the bankruptcy court used capitalization rates, i.e.. different risk assumptions, which were different than the rate extrapolated from the purchase price. The Gourleys' expert used capitalization rates of 16.9% and 18.7% for the two nursing home facilities which comprised the ongoing business. In comparison, the Eighth Circuit calculated the effective capitalization rate for the $8 million dollar purchase price at about 12%.

The trial record was extremely long, with hundreds of exhibits. At times, the record is difficult to follow and the bankruptcy court apparently did not sufficiently reference or explain its reliance on the record or its findings and conclusions in several instances. The bankruptcy court's original written decision was not based only on the purchase price of $8 million in lieu of an actual value in calculating the benefit of the bargain damages. However, the opinion is not sufficiently clear in that regard. On page 54, for example, the original decision states that "as of the time of the sale transaction, the purchase price and value were represented as $8,000,000. . ." In fact, based on the appraisals of Mr. Harrison, an ap-

praiser retained by the Userys at that time, the value would have been $8.2 million or more if the condition of the business had been as represented.

In order to erase the confusion, the bankruptcy court specifically finds that at the time of the sale transaction, if the condition of the going concern had been as represented by the Userys, the value of the business as a going concern would have been $8.2 million. This figure is based on the appraisals prepared and updated by Mr. Harrison, a qualified appraiser employed by the Userys. In his updated appraisals dated April 7, 1989, he valued the facilities at $3,700,000 or more for Ozark and $4,500,000 or more for Northside, for a total of $8,200,000 or more. See Gourley Exhibits 56 and 57, the original appraisals of the two facilities, and Exhibit 104, which contains Mr. Harrison's updated appraisal in the form of two letters, dated April 7, 1989, and addressed to Landmark Bank. Mr. Harrison's updated appraisal contained information supplied by the Userys as to what they represented to be the condition of the business. The Userys obtained the updated appraisals and held them out as an accurate reflection of the value - - or what the value would have been if the representations had been accurate - - by providing them to Landmark Bank. The Bank required the appraisals in order to make a loan to the Gourleys for a line of credit to be used after the purchase of the business. In addition, the $8.2 million figure is consistent with the $8 million price and with the evidence that Steve Usery (and accountant Judy Breeding who attended meetings where the sale price was negotiated and assisted the Userys) represented the value as $8 million or more. The Harrison updated appraisals, prepared at the time of and specifically in connection with the Usery - Gourley sale trans-

action, relied on the same false representations about the 1987 and 1988 records that Gourley relied on. The evidence was that at the meetings where the purchase price was determined, Mr. Gourley offered $7.2 million dollars, but Steve Usery said the homes were worth $8 million and demanded that amount. Mr. Gourley agreed to $8 million.

The Eighth Circuit opinion directed that both the actual value and the value as represented must be determined by application of the same capitalization rate in order that the two valuations remain consistent in reflecting the same risk assumptions represented by the capitalization rate. The Harrison appraisals used a capitalization rate of 11.5%. Those appraisals, as updated, were prepared for the Userys by a qualified appraiser at the time of the sale transaction. Mr. Harrison had no overt bias of the type described in the bankruptcy court's original decision in connection with the parties' valuation experts who testified at trial. In effect, by establishing the represented value at the time of the sale with Mr. Harrison's appraisal, the court is adopting the valuation figure proposed by the Userys' expert at trial. Using a 12% capitalization rate, the Userys' trial expert valued the homes as of the time of the sale at $9 million (see pages 27-29, bankruptcy court memorandum opinion). Accordingly, the court will use the 11.5% rate employed by Mr. Harrison. If the appraisal of Mr. Lynn, the Gourleys' expert at trial is adjusted by using an 11.5 % capitalization rate, instead of the rates of 16.9% and 18.7% he ultimately used at trial, the Gourley valuation of the actual value of the going concern as of the time of the sale will be greater than Mr. Lynn concluded at trial.

When Mr. Lynn testified at trial, before offering his ultimate conclusion using the higher capitalization rates, Mr. Lynn first testified about possible valuation figures he determined by using the same data as Mr. Harrison, with adjustments, and the same 11.5% capitalization rate as used by Mr. Harrison. Using the 11.5% rate, the Gourley expert calculated a value of $5,919,983, which the bankruptcy court now adopts as the actual value of the going concern at the time of the sale ($2,643,113 for the Northside facility, and $3,276,870 for the Ozark facility).

The Eighth Circuit noted that the Gourleys' expert had not included the laundry or retirement apartments in his valuation. The only operating facilities were the two nursing homes, Ozark and Northside. The laundry was not a separate business facility, but rather served only to provide laundry services to the two homes. The retirement apartments were part of Northside. The laundry and retirement apartments were included as part of the going concern. The Userys' arguments concerning omission of the laundry and apartments were based on their argument that the transaction between the parties was merely a sale of assets rather than sale of an ongoing business. If that were the situation, then the laundry and apartments, being situated on separate real estate lots, would have to be included. However, the Eighth Circuit, in footnote 4 of its opinion, rejected the Userys' argument that the transaction was merely an asset sale, and held that it was clear the Gourleys were purchasing the businesses as going concerns.[3]

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[3] See also the Gourleys' answer to defendants' Interrogatory No. 8 (plaintiffs' answers filed December 7, 1998 (Doc. 132 in Adversary No. 92-6038).

In calculating the benefit of the bargain damage award, the actual value of $5,919,983 must be deducted from the represented value of $8,200,000 resulting in damages of $2,280,017. In the first trial, additional damages were awarded as follows: 1) $301,735.40 as the difference between actual accounts payable and Medicare receivables; 2) $110,000 for Steve Usery's personal debt to Centerre Bank which was represented as a business debt and therefore assumed by the Gourleys; and 3) $18,000 for the Userys' personal debt to their accountant, Judy Breeding, which they falsely listed as a business debt to be assumed, and which Ms. Breeding required to be acknowledged by execution of a promissory note before she would complete certain critical work for the Gourleys after the purchase.

The Eighth Circuit affirmed the award of $301,735.40 for the difference in Medicare receivables and the actual versus the represented payables, held the $110, 000 item was clearly erroneous and questioned the $18,000 item. On remand, the Gourleys have dropped the claim for the $18,000 debt (see letter dated December 8, 1998 from Mr. Gardner, counsel for the Userys, to the court). The $110,000 personal debt which was assumed by the Gourleys will be omitted, based on consideration of the observation by the Court of Appeals that if the Gourleys had not assumed the debt, the purchase price would have been $110,000 higher. Thus the general damages are $2,280,017 for the benefit of the bargain, plus $301,735.40 for fraud related to the actual versus represented payables, for total general damages of $2,581,752.40.

II. SPECIAL DAMAGES

Finally, the Eighth Circuit Court of Appeals took up the issue of special damages awarded for additional funds the Gourleys had to put into the business in order to keep the business running after the sale. The special damages in the amount of $2.3 million included compensation for funds the Gourleys had to borrow (and the attendant interest expenses) and the Gourleys' own funds which they were forced to inject into the business (and the attendant loss of interest earned on such funds).

The Eighth Circuit noted that special damages may be recovered only if they were incurred solely as a result of the fraud. The Eighth Circuit did not rule conclusively that special damages were improper in this case. However, the Court questioned whether the special damages duplicated the general damages and directed the bankruptcy court to "give due regard to limiting the Gourleys to only a single recovery for the cash flow misrepresentation." Accordingly, upon further review in light of the Eighth Circuit's suggestion, this court determines that special damages based on the need to inject additional funds should not be awarded.

The Court of Appeals noted in footnote 6 of its opinion that special damages might be proper in connection with the misrepresentations of the amount of payables because the business operation was hampered by the lack of cash caused by the discrepancy in payables. However, in light of the Eighth Circuit's observation that damages appeared to result from the Gourleys' overly optimistic projections as well as the Userys' fraudulent misrepresentations, the bankruptcy court cannot determine, on a non-speculative basis, any rea-

sonable apportionment for any such damages, even if additional evidence (as outlined in letters and interrogatory answers) was presented by the Gourleys. As a basic matter, to the extent that any of the damages were caused by the Gourleys' erroneous projections, then the requirement that special damages result solely from the fraudulent representations cannot be met. Even assuming that issue could be resolved in the Gourleys' favor in regard to special damages allocable to the misrepresentation of payables, as addressed in footnote 6 of the appellate opinion, it would not be possible to determine the amount of damages to allocate to the payables situation without engaging in some degree of speculation. In this instance, any degree of uncertainty or speculation in the calculation and apportionment of the additional special damages referenced in footnote 6 would be contrary to the spirit of Missouri law to limit such damages to cases where it is shown the damages resulted solely from the fraud. *See Usery*, 123 F.3d 1089 at 1095, *citing Miller v. Higgins*, 452, SW2d 121, 125 (Mo. 1970).

In conclusion, the Gourleys are awarded damages for the Userys' fraud in the total amount of $2,581,752.40. In determining the final adjustment of debt between the parties, the purchase price of $8 million, which was the subject of Adversary No. 92-6038, must be adjusted. First, the long term debt assumed by the Gourleys must be deducted, as agreed by the parties. Second, the damages awarded herein must be set-off. Third, there must be some type of adjustment made for payments previously paid by the Gourleys to the Userys (or to Mary Beth separately, as discussed in the original decision).

After consideration of the issue of the payments previously made, the court concludes it is appropriate under the circumstances to deduct the amount previously paid from the principal balance. One consideration is that the balance due has been in dispute since the outset and this court, having heard the evidence and observed the credibility and demeanor of the witnesses at the lengthy trial, firmly believes the Userys' fraudulent representations were the major cause of injury to the Gourleys (as opposed to their own actions in overestimating projections). Now, at the time the judgment is being calculated, the Userys are not receiving credit for pre-judgment interest, but the Userys received substantial payments and enjoyed the benefit of using those funds while the nursing facilities were failing due to the Userys' previous management and The Userys' fraud in the sale of the business. In addition, Mary Beth received the benefit of an additional $23,000 in payments made to her separately, which she failed to credit. Rather than attempt to reconstruct and reapply the payments (including the separate ones never accounted for by Mary Beth), the uncertainties on the issue should be construed against the Userys. Under this procedure, the final adjustment would be as follows,

Purchase price:	$8,000,000.00
Less assumed long-term debt	<4,158,986.74>
Adjusted price	$3,841,013.26
Less set-off of damages	<2,581,752.40>
Less payments previously made	< 796,514.73>
Balance due to Userys	$ 462,746.13

The judgment in favor of the Userys and the bankruptcy estate shall bear interest at the Missouri legal rate because the variable rates provided under the original terms of the note are no longer appropriate and

would be difficult to ascertain due to the changes in the terms and payment periods of the obligation. Finally, the court concludes that if the Userys and/or the bankruptcy trustee were permitted to execute on the business facilities now being operated by the Gourleys, the stability and condition of the operation could be seriously harmed. This, in turn, could harm the bankruptcy estate if the trustee eventually prevailed on appeal but the facilities had declined due to the change in management and operation. On the other hand, the estate and/or the Userys might have some exposure for a decline in the condition or value pending appeal if they were permitted to execute and obtain current possession of the business. From the record, it appears that the Gourleys have operated the business in a responsible and satisfactory manner, and that permitting them to maintain possession pending any appeal would be in the best interest of all parties.

Accordingly, for the foregoing reasons it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The judgment previously entered by the bankruptcy court shall be amended as follows in regard to damages.

2. In Adversary No. 92-6038, judgment is entered in favor of the defendants Ewing B. Gourley, Carol L. Gourley, E.B.G. Healthcare III, Inc., E.B.G. Healthcare IV, Inc., Healthcare Retirement Village, Inc. and Healthcare Laundry Services, Inc., and against plaintiffs Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, Steven Usery, James McLEOD, Trustee of the Shawn Usery Trust and the Stephanie Usery Trust, and William Hart, Trustee Under Certain Deeds of Trust.

3. In Adversary No. 92-6034, judgment is entered in favor of plaintiffs Ewing Gourley and Carol Gourley and against defendants Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, and Steven N. Usery, as follows.

4. In both Adversary Nos. 92-6034 and 92-6038, the following judgment is entered:

A. Judgment is entered for damages in the total amount of $2,581,752.40 in favor of the plaintiffs, the Gourleys and their associated corporations, with interest at the Missouri legal rate and the judgment shall be set-off against the obligation owed by the Gourleys to the defendants Usery as follows.

B. The $8,000,000 note obligation shall be reduced by $4,158,986.74 in long term debt assumed by the Gourleys, and $796,514.13 for payments previously paid by the Gourleys to the Usery, leaving a balance of $3,044,499.13, which amount shall be entered as a judgment in favor of the defendants Fred Charles Moon, bankruptcy trustee in the bankruptcy estate of Mary Beth Usery in Bankruptcy Case No. 92-60255, and Steven N. Usery.

C. The money judgments of the plaintiffs Gourley shall be set-off against the money judgment of the defendants Usery, for a final judgment in favor of defendants Fred Charles Moon, bankruptcy trustee in the bankruptcy estate of Mary Beth Usery in Bankruptcy Case No. 92-60255 and Steven N. Usery $462,746.13, with interest accruing from the date of judgment judgment herein at the Missouri legal rate.

D. A judgment for costs is entered against defendants Mary Beth Usery, her bankruptcy estate in Bankruptcy No. 92-60255, and Steven Usery in Adversary No. 92-6034, and against plaintiffs Mary Beth Usery, Steven Usery and the Shawn Usery Trust and the Stephanie Usery Trust, but not against Trustee James McLeod personally, in Adversary No. 926038. Since the trials in the two adversary proceedings were consolidated, and the issues were the same in each case, the costs are not allocated to either case, but may be satisfied in either case from any of the parties named herein.

5. Pursuant to 11 U.S.C. § 523(a)(2)(B), the judgment against debtor Mary Beth Usery shall not be discharged in the bankruptcy proceeding.

6. Defendants Usery and the bankruptcy trustee shall be stayed from execution pending any appeal of this order and judgment without the filing of a supersedeas bond by the Gourleys.

/s/ Karen M. See
Karen M. See, Bankruptcy Judge

Date: January 29, 1999

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

IN RE: MARY BETH USERY,
Debtor,

EWING AND CAROL GOURLEY,
Plaintiffs,
v.
MARY BETH AND STEVE USERY, ET AL
Defendants.

MARY BETH USERY,
Plaintiff,
v.
EWING AND CAROL GOURLEY, ET AL.
Defendants.

Case No. 92-60255
Adversary No. 92-6038

ORDER GRANTING MOTION OF PLAINTIFFS, IN PART, FOR NEW TRIAL ON THE ISSUE OF DAMAGES, AND DENYING MOTION TO REVIEW, REVISE, AND SUPPLEMENT THE ORDER AND JUDGMENT ENTERED JANUARY 29, 1999, AND SETTING TRIAL DATE OF MAY 6, 1999

On August 22, 1997, the United States Court of Appeals for the Eighth Circuit (the Eighth Circuit) affirmed a decision by Judge Karen M. See in this adversary proceeding as to liability, but reversed and

remanded as to damages. The Eighth Circuit specifically stated that "[b]ecause of several errors in the calculation of damages, a new trial limited to the issue of damages is required."[1] Judge See, however, entered an Order on January 29, 1999, that purported to recalculate the damages without retrying the issue. Judge see resigned from the bench effective January 29,1999. This case was reassigned at that time. On February 8, 1999, debtor Mary Beth Usery filed a motion requesting this Court to review, revise, and supplement the Order of January 29, 1999, or, alternatively, to hold a new trial on the issue of damages.[2] After a review of the Court file, and in particular my review of the Eighth Circuit's Opinion and Judge See's Order of January 29, 1999, I find and ORDER that a partial new trial on the issue of damages is required. To that extent, the motion in the alternative by debtor Mary Beth Usery for a new trial on the issue of damages, will be SUSTAINED. The motion to review, revise or supplement the Order of January 29, 1999, is therefore, DENIED. I find that the Eighth Circuit remanded the matter for a new trial on the issue of damages, and no new trial was held. However, based on the holding of the Eighth Circuit, the matters to be decided at the new trial have been carefully circumscribed. In the interest of fairness and judicial economy, this Court does not intend to admit evidence as to the factual findings previously made by Judge See and not disturbed on appeal. Accordingly, the Court will allow evidence as to the following elements of damages:

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[1] Gourley v Usery (In re Usery), 121 F.3d 1089, 1097 (8th Cir. 1997).

[2] "Doc. # 138. payable;

1. Expert testimony as to the appropriate capitalization rate to be applied both to the represented cash flow figure for 1987, in the amount of $960,000.00, and the actual cash flow figures;

2. Expert testimony as to the manner in which the actual cash flow should be calculated, including the specific years to be used;

3. Evidence as to the actual and represented accounts payable;

4. Evidence as to an additional payment allegedly made by the Gourleys to Mary Beth Usery in the amount of $23,000.00, and evidence as to a payment of $18,000.00 allegedly made to an accountant;

5. Evidence as to the payments made by the Gourleys, the interest rate applicable, the application of such payments, and the effect that the damages awarded to the Gourleys would have on their payment obligation to the Userys; and

6. Evidence as to attorneys fees due either of the parties under applicable laws.

Given that the Court found no misrepresentations as to the laundry and the apartment complex, and given that the misrepresentations as to cash flow related to the nursing homes only, no evidence will be received as to the value of the laundry or apartment complex.

Trial as to these issues will be held on May 6, 1999, at 8:30 a.m. at the United States Courthouse, Springfield, Missouri. The Court reserves the right to begin the trial

on May 7, 1999, at 8:30 a.m. Unless notified to the contrary, the parties should assume a trial date of May 6, 1999. The parties will be notified of the exact trial date on or before May 5, 1999. In either event, the Court anticipates one day for trial of this matter. Parties should designate expert witnesses by March 15, 1999. Discovery should be concluded by April 15, 1999.

IT IS SO ORDERED.

/s/ Arthur B. Federman
Arthur B. Federman
Bankruptcy Judge

Date: 3/3/99

APPENDIX F

UNITED STATES BANKRUPTCY COURT For the
Western District of Missouri

Ewing Gourley and Carol L. Gourley,
Plaintiff

Mary Beth Usery, Steve Usery, and Mark Gardner,
Trustee
Defendant
Mary Beth Usery, Steve Usery, James McLeod,
Trustee of the Shawn Usery Trust and the Stephanie
Usery Trust, and William Hart, Trustee Under
Certain Deeds of Trust,
Plaintiffs,
v.
Ewing Gourley, Carol Gourley, E.B.G.
Health Care III, Inc., E.B.G.
Health Care IV, Inc. Healthcare Retirement Village,
Inc., Healthcare Laundry Services, Inc.
Defendants.

Case No. 92-60255-S-ABF
Adv. No. 92-6034
Adv. No. 92-6038

JUDGMENT

■ This proceeding having come on for trial or hearing before the court, the Honorable Arthur B. Federman, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

[OR]

☐ This proceeding having come on for trial before the court and a jury, the Honorable , United States Bankruptcy Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict.

[OR]

☐ The issues of this proceeding having been duly considered by the Honorable , United States Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED: that judgment is hereby entered in favor of Ewing Gourley and Carol Gourley as follows:

(1) Benefit-of-the-Bargain Damages: $692,590.27 and

(2) Special Damages for attorney fees: $515.75.

Payment of this judgment shall be by setoff from the original principal balance of the Promissory Note, which was $3,841,013.26.

IT IS FURTHER ORDERED AND ADJUDGED: that the principal balance on the Promissory Note, after setoff of the damages, was in the original amount of $3,147,567.00. That balance accrued and continues to accrue interest at the contract rate. Thus, on June 5, 1999, without default or delays, pursuant to the contract, the Gourleys should have made 120 payments on the adjusted principal balance of $3,147,909.24. The payments should have been made subject to the following variable interest rate as required by the Note:

May 1, 1989 to April 30, 1990:	9.00 per annum
May 1, 1990 to April 30, 1991:	9.50 per annum
May 1, 1991 to April 30, 1992:	10.00 per annum
May 1, 1992 to April 30, 1993:	10.50 per annum
May 1, 1993 until paid in full	11.00 per annum

The Gourleys are entitled to deduct payments made prior to 1993 in the sum of $796,514.73. The Gourleys shall have 90 days from the date of this Order to cure the default as calculated in accordance with the Promissory Note, as modified by the Order entered June 3, 1999.

IT IS FURTHER ORDERED AND ADJUGED that the judgment entered by this Court on April 14, 1995, and recorded "where appropriate" and deemed to be in satisfaction of the Promissory Note and a release of the Deed of Trust is of no force and effect. The Promissory Note and Deed of Trust are revived and represent valid and binding obligations as reduced by the damages awarded to the Gourleys. In the event the Gourleys fail to cure the default declared herein within 90 days of this Order, or fail to make any payments due hereafter under the Promissory Note or Deed of Trust, as revived and modified herein, the Usery Defendants may exercise any and all rights available by this Order, and under applicable .

ROBERT F. CONNOR
Clerk of Bankruptcy Court
BY; /s/ Sharon Hanley
Deputy Clerk

Date of issuance: 6/3/99

JUDGMENT ENTERED: June 3, 1999

Adv. Case No. 92-6038
Bankr. Case No. 92-60255

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

IN RE:
MARY BETH USERY,
Debtor.

EWING GOURLEY and CAROL L. GOURLEY,
Plaintiffs,
v.
MARY BETH USERY, STEVE USERY, and MARK GARDNER, Trustee,
Defendants .

MARY BETH USERY STEVE USERY, JAMES McLEOD, Trustee of the Shawn Usery Trust and the Stephanie Usery Trust, and WILLIAM HART, Trustee Under Certain Deeds of Trust,
Plaintiffs,
v.
EWING GOURLEY, CAROL GOURLEY, E.B.G. HEALTH CARE III, INC., E.B.G. HEALTH CARE IV, INC. HEALTHCARE RETIREMENT VILLAGE, INC., HEALTHCARE LAUNDRY SERVICES, INC.,
Defendants.

Case No. 92-60255
Adversary No. 92-6034
Adversary No. 92-6038

MEMORANDUM OPINION

These two consolidated adversary proceedings were remanded by the Eighth Circuit Court of Appeals for a new trial on the issue of damages.[1] The trial was held May 6, 1999. This is a core proceeding under 2 8 U. S. C. § 157 (b) (2) (A) and (C) over which the Court has jurisdiction pursuant to 28 U.S.C. § 1334(b), 157(a), and 157 (b) (1) . The following constitutes my Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure as made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure. I find the damages suffered by Ewing B. Gourley and Carol L. Gourley (the Gourleys) , as a result of the prior finding of fraud, to be the sum of $693,104.02. I also find that the Usery Defendants are entitled to interest at the rates specified in their agreement with the Gourleys

FACTUAL BACKGROUND

On May 1, 1989, Ewing and Carol Gourley purchased two nursing homes, retirement apartments, and a laundry (the Property) from Central Health Care Centers, Inc. (CHCC), an entity owned by Mary Beth Usery (Usery), and her former husband, Steve Usery, for $ 8,000,000. The property was subject to a mortgage in the amount of approximately $4,158,986.74 payable to another creditor. The Gourleys assumed the mortgage with the other creditor, and they executed a Promissory Note (the Note) with CHCC. The initial principal balance of the Note was, therefore, $3,841,013.26. The Note was secured by a Second Deed of Trust on the Property. The Gourleys failed to make all payments as required by

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[1] *(Gourley v. Usery (In re Usery)* , 123 F.3d 1089 (8th Cir. 1997)

the Note, and Usery filed a Chapter 11 bankruptcy case on February 17, 1992. The Gourleys filed a Complaint to Determine Dischargeability of Debt (Adv. No. 92-6034) on April 30, 1992, against Usery as well as her former husband, her children, and the trustee of a liquidating trust (the Usery Defendants). In their Complaint the Gourleys asked that the Note be canceled for fraud. Usery and the other Usery Defendants filed a Complaint on May 13, 1992, (Adv. No. 92-6038) that declared a default, stated the debt was accelerated, and asked for a judgment against the Gourleys in the amount of $4,000,000 plus interest.[2] The Usery Complaint was later amended to add Counts for judicial foreclosure and to demand immediate relinquishment of the Property.[3] Ultimately, the two adversary proceedings were joined. A trial was held beginning January 19, 1993, and covering a span of 13 days. On February 12, 1993, at the conclusion of the trial, Karen M. See, then bankruptcy judge, announced that the Usery Defendants had committed fraud, that the Gourleys were entitled to judgment, and tentatively found damages at least sufficient to cancel the Note. No Order of Judgment was entered by the Court, however, until April 14, 1995. At that time, Judge See entered judgment for the Gourleys in the total amount of $5,470,775.57, to be set off against the principal balance of the Note, leaving a judgment in favor of the Gourleys in the amount of $1,629,762.31, to bear interest at the federal statutory rate.

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[2] Adversary No. 92-6038, Doc. # 1.

[3] *Id.* at Doc. # 38.

Usery appealed this decision, but did not obtain a stay pending appeal.[4] The United States District Court for the Western District of Missouri affirmed. Usery then appealed to the Eighth Circuit Court of Appeals. On August 22, 1997, the Eighth Circuit affirmed as to liability, but remanded for another trial on the issue of damages. The Eighth Circuit noted that it was unable to make a specific finding as to benefit-of-the-bargain damages, but it also stated that "each of the illustrative calculations we have undertaken ... has yielded benefit-of-the-bargain damages of less than $600,000.."[5] The Eighth Circuit also expressed some skepticism concerning consequential damages, but preserved the Gourley's right to attempt to prove such damages on remand. Judge See, however, did not conduct another trial. Instead, on January 29, 1999, the day her resignation from the bench was effective, she entered an Order for damages in the total amount of $2,581,752.40, including both actual and consequential damages. After setoff against amounts still owing on the Note, Judge See entered a judgment in favor of the Usery Defendants in the amount of $462,746.13, with interest accruing from the date of the judgment only at the Missouri legal rate. On a variety of grounds, the most obvious being that the Order was entered without a trial on the issue, as specifically required by the Eighth Circuit, Usery filed

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[4] I note that, acting *sua sponte,* Judge See converted Usery's Chapter 11 case to Chapter 7 on or about February 12, 1993. Case No. 92-60255, Doc. # 110. That was immediately after the trial in this adversary proceeding, but over two years before a judgment was entered from which Usery could appeal. All of Usery's nonexempt assets were liquidated by the Chapter 7 trustee. I also note that Judge See, again acting *sua sponte*, entered an Order denying Usery's discharge as to all her debts.

[5] *Gourley v. Usery*, 123 F.3d at 1094.

a motion to either review, revise and supplement the order and judgment entered January 29, 1999, or for a new trial on the issue of damages. Since no trial had been held, this Court granted the motion and scheduled a hearing [6].

DISCUSSION

At the hearing, the Gourleys offered evidence as to benefit-of-the-bargain damages only. The Eighth Circuit had affirmed Judge See's finding that the net-out for the accounts payable was the sum of $301,735.40. Moreover, as special damages related to the misrepresentation of the accounts payable, the Gourleys are entitled to $513.75 in attorney's fees incurred while defending collection suits. There was no dispute as to either the net-out or the special damages. The Gourleys offered no other evidence as to consequential damages.

The Eighth Circuit specifically found that in Missouri a victim of fraud can elect to either rescind the contract or affirm the contract and recover damages. If the victim elects to affirm the contract, the damages are measured by the "benefit-of-the-bargain" rule.[7] The "benefit -of - the -bargain rule" allows the victim to recover the difference between the actual value of the property and the represented value of the property at the time of the transaction.[8]

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[6] On the effective date of Judge See's resignation, January 29, 1999, this case was assigned to the undersigned.

[7] *Gourley v. Usery* (In re Usery), 123 F.3d 1089, 1093 (with Cir. 1997).

[8] *Id.*

At the hearing on May 6, 1999, each side called an expert witness to assist the Court in determining both the actual and represented value of the Property as of May 1, 1989. The Gourleys' expert was Anthony Lynn. Mr. Lynn is a Certified Public Accountant. Lynn testified that he has worked for the Gourleys since 1991, and that he bills Mr. Gourley the sum of $15,000 to $20,000 a year for services. He also testified that he is not an MIA appraiser. Lynn had testified at the first trial in 1993. At the hearing on May 6, 1999, however, he stated that he did not testify at the first trial as to his opinion of the value of the Property. He, instead, said he had testified at the first trial as to what he believed an appraiser named Harrison, who died before the first trial, would have found the value to be. Lynn also stated that he never informed Judge See at the first trial that he was not testifying as to his own opinion as to the value of the Property, because no one asked him if it was his own opinion. At any rate, he testified at the trial on May 6, 1999, that it is his opinion that the actual value of the Property on May 1, 1989, after adjustments, was $5,091.307. He also testified that the 1988 Medicaid Cost Report did not include a laundry expense, therefore, if the laundry expense is factored in, the effect on cash flow would be such that adjusted damages would be $7,763,765.00. Lynn did admit that he has taken a rather unique approach in reaching his opinion as to value. He used a historical approach based upon cash flow for one year to arrive at "prima facia damages." He then adjusted those damages for what he described as suppressed nursing costs and laundry expenses to arrive at his final damage figure. In other words, according to Lynn's opinion of the value of the Property at the time of the transaction, instead of the Gourleys executing a Note for $3,841,013.26 to Usery, Usery should

have sold the Property to the Gourleys and then given the Gourleys a Promissory Note for over $3,000,000 just to take the Property off of her hands. Or, to put it another way, Lynn's opinion is that the Property was not only not worth $8,000,000, but in fact was worth $7,763,765 less than that. Moreover, Lynn used two new adjustments that were not litigated in the first trial. Lynn made an adjustment for suppressed nursing costs, but there was no finding of misrepresentation as to the nursing costs in either 1987 or 1988. Lynn also made an adjustment for laundry costs, which were not reflected at the first trial. There was no finding at the first trial that the Usery Defendants had made any misrepresentations as to the laundry expenses. Moreover, the Gourleys surely were aware there were laundry costs associated with running two nursing homes. And the laundry was a part of the transaction, therefore, the laundry was an inside operation. If there were laundry expenses at the nursing homes, those expense should have been offset by income at the laundry. There is no justification for the adjustments for suppressed nursing costs and recently discovered laundry costs.

Having considered Lynn's testimony in its totality, this Court rejects it. Lynn is not an independent expert. He is not an MAI appraiser. His assessment of damages defies common sense. The Property, which Lynn found had virtually no value, continues to operate. Indeed, according to the Gourleys' post-trial brief, they have successfully refinanced the first mortgage. There is no basis for finding, as the Gourleys contend, that the property had a value substantially less than that first mortgage at the time of the purchase.

Usery called as an expert James A. Tellatin. Tellatin has been an appraiser since 1976, and an MAI appraiser

since 1984. He specializes in appraising nursing homes, and has appraised approximately 2000 nursing homes located in several states. He testified that traditionally an appraiser considers three approaches in appraising real estate. The three approaches are: (1) income capitalization approach; (2) the comparable sales approach; and (3) the replacement approach. However, when evaluating a business such as a nursing home, he uses the income approach with comparable sales to determine the price per bed. An appraiser can determine value using the income approach by either of two methods. The retrospective approach looks at a minimum of a three to five year average of cash flow and applies a capitalization rate to that average. The forecast approach looks at one year of stabilized numbers and projects those numbers forward with anticipated adjustments for new management. In this case Tellatin began with the forecast approach, but he found no damages under that approach. He also noted that Judge See had relied on a retrospective income approach in the first trial, and that the Eighth Circuit had not rejected that approach. Thus, Tellatin testified as to the damages using a retrospective income approach based upon an average of cash flow from the two nursing homes, Ozark and Northside, for the years 1985, 1986, 1987, and 1988. The cash flow figures were the figures introduced by Gourley at the first trial.[9] Tellatin weighted the figures based upon external circumstances that impacted the cash flow figures for a given year. For example, Ozark was opened in 1985, therefore, its 1985 cash flow was reduced by opening costs. Northside was under a consent order during all of 1988, therefore, the cash flow figures for both homes were impacted by

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[9] *See* Gourley Ex. # 99.

additional costs incurred in order to comply with the consent order. Tellatin opined that the Gourleys suffered benefit-of-the-bargain damages totaling $390,854.87. The following chart summarizes Tellatin's opinion as to the value of the property with the cash flow figures, the weights used, and the total cash flow as weighted, based on a capitalization rate of 15 percent.

ACTUAL VALUE

YEAR	OZARK	WEIGTT	TOTAL	NORTHSIDE	WEIGHT	TOTAL
1985	$346,927	1	$ 346,927	$470,089	2	$ 940,178
1986	568,611	2	1,137,222	526,686	2	1,053,372
1987	612,593	2	1,225,186	623,543	2	1,247,086
1988	506,295	1	506,295	337,166	1	337,166
TOTAL		6	$3,215,630		7	$3,577,802

$3,215,630 ÷ 6 = $535, 938.33 (actual weighted average cash flow for Ozark)

$3,577,802 ÷ 7 = $511,114.57 (actual weighted average cash flow for Northside)

$535,938.33 + $511,114.57 = $1,047,052.01 (actual weighted average cash flow for both homes) $1,047,052.01 ÷ 15% (capitalization rate) = $6,980,346.73 (actual value)

REPRESENTED VALUE

YEAR	OZARK	WEIGTT	TOTAL	NORTHSIDE	WEIGHT	TOTAL
1985	$ 346,927	1	$ 346,927	$ 470,089	2	$ 940,178
1986	568,611	2	1,137,222	526,686	2	1,053,372
1987	612,593	2	1,225,186	623,543	2	1,247,086
1988	612,593	1	612,593	623,543	1	623,543
TOTAL		6	$3,321,928		7	$3,864,179

$3,321,928 ÷ 6 = $553,654.67 (represented weighted average cash flow for Ozark)

$3,864,179 ÷ 7 = $552,025.57 (represented weighted average cash flow for Northside)

$553,654.67 + $552,025.57 = $1,105,680,24 (represented weighted average cash flow for both homes)

$1,105,680.24 - 15% (capitalization rate) = $7,371,201,60 (represented value)

$7,371,201.60 (represented value)
-$6,980,346.73 (actual value)
$ 390,854.87 (Benefit of the Bargain Damages)

The Eighth Circuit remanded this case for a new trial on the issue of damages and instructed the Bankruptcy Court to use the same process in calculating both the actual value and the represented value, changing only the cash flow numbers.[10] The Eighth Circuit also stated that "each of the illustrative calculations we have undertaken ... has yielded benefit of the bargain damages of less than $600,000.[11] Given that clear mandate, and given the credibility not only of Tellatin's testimony, but of his methodology as well, I accept his opinion as to the benefit of the bargain damages. Tellatin is an MAI appraiser. He is an independent expert in that he does not now, nor has he ever, worked for Usery. Lynn used only the cash flow figures for 1988 in making his calculations. I find that using only one year's cash flow, especially when that one year was tainted by a consent order, does not accurately reflect the value of a going

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[10] *Usery*, 123 F.3d at 1094.

[11] *Id.*

concern with a financial past. Tellatin used the weighted average of four years of cash flow. I further find that weighting the cash flow numbers, when there is a reasonable explanation for a specific variation, more accurately reflects the value of a going concern. Finally, I find that a capitalization rate of 15 percent is an appropriate capitalization rate for the Property. The Eighth Circuit mandated that the same capitalization rate be applied to both the actual and represented cash flow figure.

To recap the total amount of damages at issue here:

Benefit of the Bargain Damages:	$390,854.87
Accounts Payable:	301,735.40
Attorneys Fees:	513.75
Total Damages:	$693,104.02

Determining the amount of damages does not, however, resolve all remaining issues. The Gourleys chose to affirm the contract and sue for benefit-of-the-bargain damages. They are, thus, bound by the terms of the contract as adjusted by the damages. The Note was for the agreed principal amount of $3,841,013.26, payable with interest over a period of 20 years. That agreed principal amount must be adjusted by the amount of $693,104.02, the damages as found by the Court. The Note, therefore, is as if it were in the original principal amount of $3,147,909.24. The term of the Note required 240 monthly installments consisting of principal and interest on the unpaid principal beginning on June 5, 1989.[12] The interest rate, pursuant to the Note is as follows:

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[12] Case No. 92-6038, Doc. # 138; Case No. 92-6034, Doc. # 117.

May 1, 1989 to April 30, 1990:	9.00 per annum
May 1, 1990 to April 30, 1991:	9.50 per annum
May 1, 1991 to April 30, 1992:	10.00 per annum
May 1, 1992 to Aprilm 30, 1993:	10.50 per annum
May 1, 1993 until paid in full	11.00 per annum[13]

The Gourleys made payments on the Note in the amount of $796, 514.73 before they defaulted. But no payments have been made on the Note since 1993, and not all payments were made prior to that time.

The Gourleys executed the Note in favor of CHCC, providing for monthly payments, over a period of 20 years. For the first four years, the Gourleys made some, though not all, of the required payments. Thereafter, based on Judge See's bench ruling of February 12, 1993, the Gourleys stopped making payments, thinking that their obligation had been canceled by setoff. In fact, Judge See entered an Order specifically providing that the Gourleys' obligation had been satisfied.[14] However, in its Order of Remand, entered on August 22, 1997, the Eighth Circuit foresaw that Gourley's damages on re-trial would be substantially less than their obligation, meaning that the Gourleys would owe a debt to the Usery Defendants under the contract. By electing to affirm the Note, rather than having the Note rescinded, as was their choice, the Gourleys also elected to affirm the interest rate, as negotiated, on the unpaid principal balance for as long as that unpaid principal balance is due.

The Gourleys argue that they should not be required to pay any interest from the date of their execution of the Note, in 1989, until the date the Court first entered

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[13] *Id.*

[14] Adversary No. 92-6038, Doc. # 86.

judgement against them, on January 29, 1999. As support, the Gourleys rely on Missouri law, which generally denies prejudgment interest on unliquidated claims. This argument might be persuasive if the Gourleys had exercised their right to rescind the contract and recover any benefits conferred on the Usery Defendants. But, as the Eighth Circuit pointed out, the Gourleys elected to affirm the Note and sue for benefit-of-the-bargain damages. The goal of benefit -of -the -bargain damages is to restore the Gourleys to the position in which they would have been in the absence of the fraud,[15] not to protect them from their own bad judgment. The award of damages in the amount of $693,104.02 accomplishes that goal. As to the interest rate due under the Note, however, the Gourleys agreed to that rate in the original contract, and affirmed that obligation by choosing to retain the Property, and not rescind the contract. Mr. Gourley now apparently believes that that rate is too high. If so, his agreement to pay that rate initially is a consequence of his own bad judgment, and not the Usery's fraud.

In Missouri the allowance of interest must be based upon either a statute or contract.[16] In this case, the contract provides for interest. The existence of an unliquidated set-off or counterclaim does not bar interest as provided in a promissory note.[17] Where the amount due or to become due is fixed by agreement between parties, the claim may be said to be liquidated so as to

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[15] *Gourley v. Usery*, 123 F.3d 1089, 1094 (8th Cir. 1997).

[16] *St. John's Bank & Trust Co. v. Intag, Inc,* 938 S.W.2d 627, 630 (Mo. Ct. App. 1997).

[17] *Twin River Const. Co., Inc. v. Public Water Dist. No. 6*, 653 S.W.2d 682, 695 (Mo. Ct. App. 1983).

bear interest, despite a party's denial of liability, or even the existence of a bona fide dispute as to the amount of the indebtedness.[18] It is the character of the claim, and not of the defense to it, that determines whether it is liquidated.[19] Once the Court finds for a party on a Note, the damages in the form of principal and interest follow as a matter of law, and the principal and interest can be calculated from the face of the Note regardless of whether one party knows exactly how much is due and owing.[20] Moreover, if a claim is liquidated, the interposition of a counterclaim, set-off, or defense does not convert the liquidated claim into an unliquidated one precluding the accrual of interest.[21] That is essentially what happened here. The original principal balance was reduced by the benefit-of-the-bargain damages, thereby compensating the Gourleys for the damages they sustained. But since the Gourleys chose to retain the benefit of their bargain with the Userys, they are obligated to pay the interest they bargained for.

This Court found one case from another state with a similar fact pattern. In *Brown v. Richards*,[22] a seller brought suit against a buyer to enforce a purchase agreement, and the buyer brought a counterclaim against the seller for fraud. The court found for both parties on their various claims and held that the buyer was not

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[18] *Boatmen's Bank of Butler v. Berwald,* 752 S.W.2d 829, 835 (Mo. Ct. App. 1988).

[19] *Id. See also Stephenson v. First Missouri Corp.*, 861 S.W.2d 651 (Mo. Ct. Ap. 1993).

[20] *Id.*

[21] *Ehrle v. Bank Building & Equipment Corp. of America*, 530 S.W.2d 482, 496 (Mo. Ct. App. 1975).

[22] 840 P.2d 143 (Utah Ct. App. 1992).

entitled to collect benefit -of -the -bargain damages and to retain ownership of the entity without making further payments as required by the contract after adjustments for the fraud damages. The Court further found that the seller was entitled to interest on the purchase price after adjustment for the damages. In reaching its decision, the court found that to allow the buyer to collect the benefit-of-the-bargain damages and obtain ownership of the property without making the payments as required by the contract would allow the buyer to reap a windfall.[23] In other words, the rationale behind the benefit -of -the -bargain rule is that because of the seller's fraud, the buyer paid more for the property than the property was worth, therefore, the buyer deserves to recoup the overpayment. The Court in *Brown* found that the buyer received his benefit-of the-bargain by having the purchase price reduced by the amount of the damages. He was also entitled to credit against the adjusted contract purchase price for any payments already made.[24] After those adjustments, the buyer must satisfy the unpaid portion of the contract in order to retain ownership.[25] The Court stated that this is the legal result of the buyer's election to affirm and enforce the contract rather than to rescind it.[26] Since the adjustment to the purchase price is retroactive to the date of the contract, the seller was entitled to interest on the adjusted purchase price from the date of the contract.[27]

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[23] *Id.* at 150.

[24] *Id.* at 152.

[25] *Id.* at 150-51.

[26] *Id.*

[27] *Id.*

Thus, I find that, as of June 5, 1999, pursuant to the contract, the Gourleys are obligated for 120 payments on the adjusted principal balance of $3,147,909.24. The payments are subject to the variable interest rate as required by the Note. The interest rate, pursuant to the Note is as follows:

May 1, 1989 to April 30 1990: 9.00 per annum

May 1, 1990 to April 30 1991: 9.50 per annum,

May 1, 1991 to April 30 1992: 10.00 per annum.

May 1, 1992 to April 30 1993: 10.50 per annum

May 1, 1993 until paid in full 11.00 per annum[28]

The Gourleys are entitled to deduct payments made prior to 1993 in the sum of $796,514.73. Under this finding, it is undisputed that the Gourleys are in default under the terms of the Note. The Usery Defendants sought a judgment against the Gourleys in their amended Complaint, claiming a default and acceleration of the debt. Since the original principal balance has now been adjusted, however, any notice of acceleration sent at the time would have been incorrect and ineffective.[29] I, therefore, will find that as of now, there is a substantial arrearage due, but that the Note has not been accelerated. I will allow the Gourleys 90 days to cure the default as calculated in accordance with this Memorandum Opinion.

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[28] *Id.*

[29] *See First Bank Investors' Trust v. Tarkio College (In re Tarkio College)* , 129 F.3d 471, 475 (8th Cir. 1997) (holding that an acceleration clause does no more than give the creditor the option to treat the debt as due. The creditor then must accelerate the note by giving notice to the debtor of the exact amount due).

I also find that the Usery Defendants hold a valid Note and Deed of Trust as to the Property. While Judge See deemed the Note satisfied and the Deed of Trust released, those actions were based on her conclusion that the Gourleys had suffered damages in excess of the amount they owed to the Usery Defendants. That conclusion was timely appealed, and was reversed. An issue may exist as to the priority of the Deed of Trust vis-a-vis any loan which the Gourleys obtained subsequent to Judge See's Order releasing the Deed of Trust, but the underlying basis for that release was removed by the Eighth Circuit, and the Deed of Trust is in full force and effect. If payment is not made pursuant to the Note, as adjusted in this Memorandum Opinion and the accompanying Order, the Usery Defendants may proceed to exercise all remedies available to them under the Note, the Deed of Trust, and applicable law.

An Order in accordance with this Memorandum Opinion will be entered this date.

s/s Arthur B. Federman
Arthur B. Federman
Bankruptcy Judge

Dated: 6/3/99

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

IN RE:
MARY BETH USERY,
Debtor.

EWING GOURLEY and CAROL L. GOURLEY,
Plaintiffs,
v.
MARY BETH USERY, STEVE USERY, and MARK GARDNER, Trustee,
Defendants.

MARY BETH USERY STEVE USERY, JAMES McLEOD, Trustee of the Shawn Usery Trust and the Stephanie Usery Trust, and WILLIAM HART, Trustee Under Certain Deeds of Trust,
Plaintiffs,
v.
EWING GOURLEY, CAROL GOURLEY, E.B.G. HEALTH CARE III, INC., E.B.G. HEALTH CARE IV, INC. HEALTHCARE RETIREMENT VILLAGE, INC., HEALTHCARE LAUNDRY SERVICES, INC.,
Defendants.

Case No. 92-60255
Adversary No. 92-6034
Adversary No. 92-6038
FILED: June 3, 1999

ORDER

In accordance with the Memorandum Opinion entered this date, I find in favor of Ewing Gourley and Carol Gourley as follows:

(1) Benefit-of-the-Bargain Damages: $692,590.27 and

(2) Special Damages for attorney fees: $515.75.

The Clerk of Court is ORDERED to enter judgment in favor of Ewing and Carol Gourley in that amount. Payment of this judgment shall be by setoff from the original principal balance of the Promissory Note, which was $3,841,013.26.

I, therefore, find and Order that the principal balance on the Promissory Note, after setoff of the damages, was in the original amount of $3,147,567.11. That balance accrued and continues to accrue interest at the contract rate. Thus, on June 5, 1999, without default or delays, pursuant to the contract, I find that the Gourleys should have made 120 payments on the adjusted principal balance of $3,147,909.24. The payments should have been made subject to the following variable interest rate as required by the Note:

May 1, 1989 to April 30, 1990:	9.00 per annum
May 1, 1990 to April 30, 1991:	9.50 per annum
May 1, 1991 to April 30. 1992:	10.00 per annum
May 1, 1992 to April 30, 1993:	10.50 per annum
May 1, 1993 until paid in full	11.00 per annum[30]

The Gourleys are entitled to deduct payments made prior to 1993 in the sum of $796,514.73. The Gourleys shall have 90 days from the date of this order to cure the default as calculated in accordance with the Promissory Note, as modified by this Order.

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[30] *Id.*

I further find and Order that the judgment entered by this Court on April 14, 1995, and recorded "where appropriate" and deemed to be in satisfaction of the Promissory Note and a release of the Deed of Trust is of no force and effect. The Promissory Note and Deed of Trust are revived and represent valid and binding obligations as reduced by the damages awarded to the Gourleys. In the event the Gourleys fail to cure the default declared herein within 90 days of this Order, or fail to make any payments due hereafter under the Promissory Note or Deed of Trust, as revived and modified herein, the Usery Defendants may exercise any and all rights available to them under the Promissory Note and Deed of Trust, as modified by this Order, and under applicable law.

IT IS SO ORDERED.

/s/ Arthur B. Federman
Arthur B. Federman
Bankruptcy Judge

Dated: 6/3/99

APPENDIX G

United States Bankruptcy Appellate Panel
FOR THE EIGHTH CIRCUIT
No. 99-6048WM

In re:
MARY BETH USERY
Debtor.

EWING B. GOURLEY and CAROL L. GOURLEY
Plaintiffs-Appellants
v.
MARY BETH USERY; STEVEN USERY;
and MARK GARDNER
Defendants-Appellees.

MARY BETH USERY; STEVEN USERY;
MARK GARDNER, Trustee of the Shawn Usery
Trust and the Stephanie Usery Trust; and
WILLIAM HART, Trustee Under Certain
Deeds of Trust
Plaintiffs - Appellees
v.
EWING B. GOURLEY; CAROL L. GOURLEY;
E.B.G. HEALTH CARE III, INC.;
E.B.G. HEALTH CARE IV, INC.;
HEALTH CARE RETIREMENT VILLAGE, INC.;
and HEALTH CARE LAUNDRY SERVICES, INC.
Defendants-Appellants.

Appeal from the United States Bankruptcy Court for
the Western District of Missouri

Submitted: November 10, 1999
Filed: December 16, 1999

Before WILLIAM A. HILL, SCOTT, and DREHER, Bankruptcy Judges.
DREHER, Bankruptcy Judge

Ewing and Carol Gourley ("Appellants") appeal from the order of the bankruptcy court[1] calculating damages in their fraud case after remand from the Eighth Circuit Court of Appeals for a new trial limited solely to that issue. The facts of this case are set forth in the Eighth Circuit's opinion in *Gourley v. Usery* (*In re Usery*), 123 F.3d 1089 (8th Cir. 1997), and will be expanded below only to the extent necessary for the issues presently on appeal.

I. BACKGROUND

On May 1, 1989, Appellants purchased two nursing homes known as Northside Nursing Center ("Northside") and Ozark Nursing and Care Center ("Ozark") from Central Health Care Centers, Inc., which was owned by Appellees Mary Beth Usery, her then-husband Steve Usery, and a trust for the benefit of their children ("Appellees"). The terms of the transaction provided that the Appellants would pay a total of $8 million for the business. The Appellants agreed to assume debts of the business totaling $4,158,986.74 and signed a promissory note in favor of the Appellees for the remaining portion of the purchase price ($3,841,013.26). The Appellants agreed to the purchase on the representation that the cash flow for the 15 month period that included 1987, after service of existing debt, was approximately $1.2 million, or $960,000 annually. The Appellees further represented that, although complete financial

[1] The Honorable Arthur B. Freeman, United States Bankruptcy Judge, Western District of Missouri.

records were not yet available, cash flow in 1988 was substantially the same as 1987. Appellants determined, based on these representations, that the cash flow would be sufficient to pay the current expenses, the assumed liabilities, and the promissory note, while still allowing them to earn a profit. Appellants were aware that, due to certain management problems, Northside was operating under a consent agreement with the state during part of 1988.

Due to cash flow problems with the business, the Appellants stopped making full payments on the promissory note and eventually began missing payments altogether. Because Mary Beth Usery depended on the income from the promissory note, she filed a Chapter 11 bankruptcy case on February 17, 1992. The Appellants, claiming that the Appellees had defrauded them in the sale of the business, filed an adversary proceeding to cancel the promissory note and determine the dischargeability of damages arising out of the fraud. The Appellees also filed an adversary proceeding seeking a judgment against the Appellants in the amount of the promissory note. The two adversary proceedings eventuallywere joined and tried before the Hon. Karen M. See.

At the end of the trial Judge See orally found that the Appellees had committed fraud in connection with the sale of the business. She found, in relevant part, that the Appellees had misrepresented the business's cash flow in 1988 as being substantially the same as the cash flow in 1987 when, in fact, it was significantly lower. She tentatively found that the damages at least equaled the amount of the promissory note. She later ordered entry of judgment for the Appellants. In her written opinion, she found that damages actually totaled $5,470,775.57.

Benefit of the bargain damages, which Judge See defined as the difference between the actual value of the business and the price paid, totaled $2,697,000.26.[2] In reaching this sum, she specifically adopted the valuation of the business by Appellants' expert, who concluded that the actual value was $5,175,000.00, based on the average cash flow for 1985, 1986, and 1988 divided by a capitalization rate of 16.9% for Ozark and 18.7% for Northside. She also agreed with the Appellants' expert that the cash flow for 1987 should not be included in the calculation because that year was atypical. After the damages were set off against the promissory note, judgment was entered in favor of the Appellants in the amount of $1,629,762.31.

Appellees appealed the decision to the United States District Court for the Western District of Missouri, which affirmed. Appellees then appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed as to the liability of the Appellees, but found several errors with respect to the damages. Most importantly for the present appeal, the Court found that the bankruptcy court used an improper formula for calculating benefit of the bargain damages. Instead of the difference between the *price paid* and the actual value, the Eighth Circuit concluded that the proper measure of damages was the difference between the *value of the business had it been as represented* and the actual value. The Court remanded the case for a new trial on the issue of damages. The instructions specifically provided:

> On remand, the Bankruptcy Court must determine the difference between the actual value of the nurs-

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[2] The remaining portion of the damages was overturned by the Eighth Circuit and are not at issue in this appeal.

> ing homes and the value of the homes *as represented*, using the same capitalization rate for each part of the equation. In other words, the court must use the same process to calculate both valuation figures, changing only the cash-flow numbers. Because valuation is a subjective art, we are unable to make a specific finding as to damages on appeal, but we note that each of the illustrative calculations we have undertaken, including the example presented in [Appellees'] reply brief, has yielded benefit-of-the-bargain damages of less than $600,000.

Gourley v. Usery, 123 F.3d 1089, 1095 (8th Cir. 1997). In its conclusion the Court further stated:

> Because of several errors in the calculation of damages, a new trial limited to the issue of damages is required. The judgment of the District Court is affirmed as to liability and reversed as to damages, and the case is remanded with instructions to remand to the Bankruptcy Court for further proceedings in accordance with the opinion.

Id. at 1097.

On remand, Judge See entered an order recalculating the damages without conducting a new trial. In this order, Judge See concluded that the value of the business as represented was $8.2 million, and the actual value was $5,919,983.00. Thus, she found benefit of the bargain damages totaled $2,280,017.00. After adding other damages that are not at issue on appeal, Judge See set off the sum against the promissory note. Because the outstanding amount of the promissory note exceeded the total damages, Judge See ordered entry of judgment in favor of the Appellees in the amount of $462,746.13.

After Judge See left the bench, the case was transferred to Hon. Arthur B. Federman, and the Appellees moved for a new trial on the issue of damages. Judge Federman granted the motion because no retrial had been held, which he found violated the Eighth Circuit's instructions on remand.[3] In the order granting the motion for a new trial, the court stated:

> [B]ased on the holding of the Eighth Circuit, the matters to be decided at the new trial have been carefully circumscribed. In the interest of fairness and judicial economy, this Court does not intend to admit evidence as to the factual findings previously made by Judge See and not disturbed on appeal.

The second trial was held on May 6, 1999. Each side called an expert witness to testify as to both the actual and represented value of the business. The Appellants' expert calculated the two values based solely on the actual and represented cash flow for 1988 and a capitalization rate of fourteen percent. After making adjustments to the actual value for what he described as suppressed nursing costs and laundry expenses, the expert concluded that the damages would total $7,363,765.00. The bankruptcy court rejected this expert's opinion as defying common sense because it rendered the business nearly valueless even though it continued to operate and had successfully refinanced its mortgage. The court observed that such a value would mean that the Appellees, as the sellers, should have paid the Appellants to purchase the business from them and assume the debt. It further found no justification for the adjustments made by the expert. Finally, the court

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[3] The Appellants do not argue that the granting of a new trial was in any way improper or incorrect.

also noted that the expert was not independent (he had previously done and continued to do other work for the Appellants) and was not an MAI appraiser.

Appellees called an MAI appraiser who specialized in appraising nursing homes. He figured the actual and represented value based on the average cash flow of the two nursing homes for 1985 through 1988. He weighted the figures to account for external circumstances for each year and determined the value based upon a capitalization rate of fifteen percent. This expert concluded that the Appellants suffered benefit of the bargain damages in the amount of $390,854.87. The following chart summarizes his opinion, which the bankruptcy court adopted as its calculation of damages.

ACTUAL CASH FLOW

YEAR	OZARK	WEIGHT	TOTAL	NORTHSIDE	WEIGHT	TOTAL
1985	$346,927	1	$346,927	$470,089	2	$940,178
1986	$568,611	2	$1,137,222	$526,686	2	$1,053,372
1987	$612,593	2	$1,225,186	$623,543	2	$1,247,086
1988	$506,295	1	$506,295	$337,166	1	$337,166
TOTAL		6	$3,215,630		7	$3,577,802

Actual weighted average cash flow for Ozark:
$3,215,630 ÷ 6 = $535,938.33
Actual weighted average cash flow for Northside:
$3,577,802 ÷ 7 = $511,114.57
Actual weighted average cash flow for both:
$535,938.33 + $511,114.57 = $1,047,052.01

Actual Value: $1,047,052.01 ÷ 15% capitalization rate = $6,980,346.73

REPRESENTED CASH FLOW

Year	Ozark	Weight	Total	Northside	Weight	Total
1985	$346,927	1	$346,927	$470,089	2	$940,178
1986	$568,611	2	$1,137,222	$526,686	2	$1,053,372
1987	$612,593	2	$1,225,186	$623,543	2	$1,247,086
1988	$612,593	1	$612,593	$623,543	1	$623,543
TOTAL	6	$3,321,928	7	$3,864,179		

Represented weighted average cash flow for Ozark: $3,321,928 ÷ 6 = $553,654.67
Represented weighted average cash flow for Northside: $3,864,179 ÷ 7 = $552,025.57
Represented weighted average cash flow for both: $553,654.67 + $552,025.57 = $1,105,680.24

Represented value: $1,105,680.24 ÷ 15% capitalization rate = $7,371,201.60

Benefit of the Bargain Damages: $7,371,201.60 - $6,980,346.73 = $390,854.87

In adopting these figures, the bankruptcy court specifically noted the credibility of the Appellees' expert witness both in his testimony and his methodology. In particular, the court agreed that valuation of the business required using more than just one year's cash flow, contrary to the Appellants' expert's methodology. It further agreed that lesser weight should be accorded to (1) Ozark's cash flow for 1985 because it was newly in business that year; and (2) the entire cash flow for 1988 because of the existence of the consent agreement with the state. Accordingly, the presence of these circumstances made these particular numbers less indicative of the actual value of the business as a going concern.[4]

[4] Judge Federman did not address Judge See's conclusion that the results of 1987 were also atypical.

The bankruptcy court added the $390,854.87 in benefit of the bargain damages to other damages totaling $302,249.15 that the parties do not dispute. Thus, the damages totaled $693,104.02. The court determined that this amount should be offset against the outstanding amount of the promissory note, which resulted in a judgment in favor of the Appellees. The bankruptcy court further found that the Appellees were entitled to interest on the judgment pursuant to the original terms of the promissory note, less the amount of the damages and any payments previously made.[5] The court did not specifically calculate the final amount of the judgment.

The Appellants appeal to the Bankruptcy Appellate Panel asserting eight separate errors in the calculation of damages.[6]

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[5] Appellants do not challenge the award of interest on appeal.

[6] The Appellants list the following arguments: (1) that the court erred in allowing evidence and altering findings that were not disturbed on appeal with respect to represented and actual cash flow in 1987 and 1988; (2) that the court erred by assigning more weight to cash flow for 1987 despite evidence that the operations for that year were not typical; (3) that the court erred in using an historical approach with respect to represented cash flow because only cash flow for 1987 and 1988 was represented to them; (4) that the court erred in assigning less weight to the cash flow of Ozark for 1988 when the consent order only affected Northside; (5) that the court erred in assigning less weight to the cash flow of Northside for 1988 when the consent order was only in place for part of the year; (6) that the court erred in assigning less weight to the cash flow for 1988 because, as the year immediately preceding the sale, it should have been given more importance; (7) that the court erred in using a weighting system at all; and (8) that the court erred in assigning less weight to the cash flow of Ozark for 1985 due to start up costs because the home was actually licensed in 1982 and fully operational in 1984.

II. STANDARD OF REVIEW

Although the Appellants raise eight separate arguments on appeal, their arguments actually raise only two basic issues, each of which requires a different standard of review. The issue of whether the bankruptcy court exceeded the mandate of the Eighth Circuit on remand is a question of law subject to de novo review. *S & P, Inc. v. Pfeifer,* 189 B.R 173, 179 (N.D. Ind. 1995).

The bankruptcy court's decision regarding the amount of damages is a factual finding and will not be disturbed unless the finding is clearly erroneous. *Arkansas Rice Growers Coop. v. Alchemy Indus.*, 797 F.2d 565, 571 (8th Cir. 1986); *Institut Pasteur v. Cambridge Biotech Corp.* (In re Cambridge Biotech Corp.), 186 F.3d 1356, 1369 (Fed. Cir. 1999); *Lentil v. Ulrich,* (In re Lentil), 236 B.R. 720, 723 (B.A.P. 9th Cir. 1999); *TranSouth Financial Corp v. Sharon (In re Sharon)*, 234 B.R. 676, 679-80 (B.A.P. 6th Cir. 1999); *Shimer v. Fugazy (In re Fugazy Express, Inc.)*, 124 B.R. 426, 430 (S.D.N.Y. 1991). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Forbes v. Forbes (In re Forbes)*, 215 B.R. 183, 187 (B.A.P. 8th Cir. 1997) (quoting *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985)). A choice between two permissible views of the evidence cannot be clearly erroneous. *Davis v. Delo*, 115 F.3d 1388, 1393-94 (8th Cir. 1997).

To the extent that Appellants seek review of the methodology chosen to compute damages, the abuse of discretion standard applies. *Cambridge Biotech*, 186 F.3d at 1369. An abuse of discretion may only be found if the lower court's judgment was based upon clearly

erroneous factual findings or erroneous legal conclusions. *Hopper v. Hopper (In re Hopper)*, 228 B.R. 216, 217 (B.A.P. 8th Cir. 1999). The abuse of discretion standard is indistinguishable from the clearly erroneous standard in its application. *Forbes*, 215 B.R. at 187 n.6.

III. DISCUSSION

A. The Eighth Circuit's Mandate And The Law of The Case

The Appellants first argue that the bankruptcy court exceeded its authority on remand by (1) looking to cash flow figures for years other than 1988 when only 1988 figures were represented to them; (2) taking new evidence on the cash flow figures for 1988 rather than using the figures adopted by Judge See; and (3) including the cash flow for 1987 in the valuation calculation when Judge See had found that year to be atypical. Appellants' contentions, in this respect, require an examination of the law of the case doctrine and its corollary, the mandate rule.

The law of the case doctrine prevents relitigation of a settled issue in a case and requires that courts follow decisions made in earlier proceedings to insure uniformity of decisions, protect the expectations of the parties, and promote judicial economy. *Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 784 (8th Cir. 1996); see also *Exxon Corp. v. United States,* 931 F.2d 874, 877 (Fed. Cir. 1991). When a case has been decided by the Eighth Circuit on appeal and remanded, every question decided by the appellate court, whether *expressly or by necessary implication*, is finally settled and determined, thus creating a mandate for the lower court. Klein, 73 F.3d at 784; *Paull v. Archer-Daniels-Midland Co.*, 313

F.2d 612, 617 (8th Cir. 1963) (*citing Thornton v. Carter*, 109 F.2d 316, 319-20 (8th Cir. 1940)); *see also Lamb Engineering & Constr. Co. v. Nebraska Public Power Dist.*, 145 F.3d 996, 998 (8th Cir. 1998) ("Under the law of the case doctrine, the [lower] court was bound on remand to obey the Eighth Circuit's mandate and not to re-examine issues already settled by our prior panel opinion."); *S&P, Inc. v. Pfeifer*, 189 B.R. 173, 179-80 (N.D. Ind. 1995). The mandate of the appellate court is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue that was not expressly or impliedly disposed of on appeal. *Paull*, 313 F.2d at 617 (citing Thornton, 109 F.2d at 319-20); *see also Quern v. Jordan*, 440 U.S. 332, 348 n.18 (1979); *Exxon*, 931 F.2d at 877; *S&P*, 189 B.R. at 180. Moreover, the lower court is not bound by its own earlier rulings unless explicitly or implicitly adopted by the appellate court.[7] *Exxon*, 931 F.2d at 877; *S&P*, 189 B.R. at 180.

The application of the mandate rule and the law of the case doctrine depends substantially upon the language of the appellate court's opinion. *Bailey v. Henslee*, 309 F.2d 840, 843 (8th Cir. 1992); S&P, 189 B.R. at 180. Appellants recognize that the Eighth Circuit's opinion, as it related to the damages award, contained three requirements: (1) the bankruptcy court was to measure damages not by the difference between purchase price and actual value, but by the difference between the value as represented and actual value; (2) the bank-

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[7] The fact that the case was transferred to a different judge prior to the second trial does not affect Judge Federman's ability to reconsider issues not finally determined by the prior appeal. Exxon, 931 F.2d at 878 ("To the extent that a trial judge can alter a previous ruling, so too can a successor judge.").

ruptcy court was to use the same capitalization rate to calculate both actual and represented value; and (3) the bankruptcy court was to use the same process for calculating both actual and represented value, changing only the cash flow numbers.

The bulk of Appellants' argument centers on the first of these instructions. They reason that, because the Appellees only represented 1988 cash flow to them, the value "as represented" can only be based on 1988 cash flow. Therefore, they argue that the bankruptcy court violated the mandate of the Eighth Circuit by using cash flow from other years to determine the value "as represented." While it may be true that the Appellees only represented 1988 cash flow to the Appellants, such representation did not amount to the entire represented value of the business. Under well-accepted valuation techniques, a proper valuation of an on-going business requires consideration of more than one year's cash flow. The instruction to determine the value of the business "as represented" meant using normal, well-accepted valuation techniques inserting any misrepresented figures in place of the actual figures in the calculation. The represented value of the business, thus, was affected by the fraudulent representation of cash flow for 1988, but it did not limit the scope of valuation to just that year. The bankruptcy court did not err in considering the cash flow for other years in valuing the business "as represented."

The bankruptcy court also followed the remaining instructions of the Eighth Circuit's mandate. It used the same capitalization rate and the same process for calculating both actual and represented value, substituting only the misrepresented cash flow figures. It then determined the amount of the damages by subtracting the

actual value of the business from the value as represented.

Appellants further contend that the bankruptcy court violated the law of the case doctrine because any findings that were left undisturbed by the Eighth Circuit remained binding on the bankruptcy court on remand. In particular they assert that on remand the bankruptcy court should not have taken new evidence related to the actual and represented cash flow for 1988 and should not have included the cash flow figures for 1987 in its calculations because Judge See's findings on these matters were not disturbed on appeal. Appellants' argument is not a proper application of the law of the case doctrine. *See Exxon*, 931 F.2d at 877 ("[The appellant] contends that when the dispositive finding of [the judge] . . . was not disturbed on appeal, it became the law of the case and thus not subject to further revision. This argument misapprehends the scope and meaning of the law of the case doctrine."). Unless the opinion either *expressly or by necessary implication* adopted the bankruptcy court's findings on actual and represented cash flow for 1988 or the exclusion of 1987 cash flow from the calculation, the bankruptcy court was free to reexamine those issues. *Exxon,* 931 F.2d at 877; *S&P*, 189 B.R. at 180.

In the portion of the Eighth Circuit's opinion affirming as to liability, the Court nowhere expressly adopted the actual or represented cash flow figures for 1988. Similarly, it did not expressly adopt the decision to exclude 1987 cash flow from the calculation. Thus, the court must have adopted the findings by necessary implication in order for the bankruptcy court to be bound by them. *Exxon*, 931 F.2d at 877; *S&P*, 189 B.R. at 180. Although the Court mentions the bankruptcy

court's 1988 figures, such findings were not relied upon or necessary to the decision. Only the fact that the 1988 cash flow was far less than cash flow in 1987 was necessarily implied by the decision to affirm. Likewise, the decision to exclude 1987 cash flow from the valuation had no bearing on the Court's decision with respect to the damages. Consequently, the bankruptcy court was free to reexamine these findings. *See Exxon*, 931 F.2d at 878 ("We hold that when a judgment has come before us for review, and certain findings of fact were not examined in, relied on, or otherwise necessary to our decision in that appeal, law of the case does not prevent the trial court on remand from reexamining those findings . . . .").

Accordingly, the bankruptcy court did not violate the mandate of the Eighth Circuit or the law of the case doctrine on remand.[8]

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[8] Moreover, the Appellants' never raised an objection during the trial that the evidence exceeded the mandate either with respect to determining the value "as represented" or taking new evidence on "undisturbed" findings. The only objection was a continuing objection that some of the arguments being advanced by the Appellees attempted to retry the issue of liability. Because the Appellants did not object at trial to the admission of the evidence, the matter can only be reviewed for plain error, *McKeel v. City of Pine Bluff*, 73 F.3d 207, 211 (8th Cir. 1996), which requires that failure to correct the matter will result in a miscarriage of justice. *Cross v. Cleaver*, 142 F.3d 1059, 1067 (8th Cir. 1998). We are satisfied that no such error occurred.

Appellants also did not object that the scope of the evidence went beyond the court's order for a new trial. Both sides came prepared for a trial on the issue of damages. Indeed, the Appellants themselves offered new evidence as to the "undisturbed" figures by making adjustments to actual value for suppressed nursing costs and laundry expenses. Appellants cannot now claim that they

Continued on next page

B. Calculation of Damages

The Appellants cite numerous points of error with respect to the bankruptcy court's method of determining the actual and represented values of the business. They balk at the weight given to the 1987 cash flow, the 1988 cash flow, and Ozark's 1985 cash flow, and the use of a weighting system at all. Appellants do not suggest that the Appellees' method of calculation is an impermissible way to value a business. They merely assert that the method was incorrect under these circumstances.

The bankruptcy court had before it two experts to testify as to the value of the business. It found the Appellees' expert to be more credible both in his testimony and his methodology than Appellants' expert and found that the opinion of Appellants' expert defied common sense. Thus, the court reasonably chose to adopt the findings of one expert rather than the other. It cannot be clear error to choose between two permissible views of the evidence. *Davis v. Delo*, 115 F.3d 1388, 1393-94 (8th Cir. 1997). Thus, the bankruptcy court's

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Footnote 8 continued

were somehow misled by Judge Federman's order. Although the order stated that the court would not admit evidence as to factual findings not disturbed on appeal, such order clearly related to the findings, affirmed by the Eighth Circuit, that the Appellees were liable for fraud. To the extent that the issues presented at trial exceeded the scope of the order, the parties are deemed to have consented. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1063 (8th Cir. 1997) (*citing Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 275 (8th Cir. 1978)); *see also United States v. National Homes Construction Corp*, 581 F.2d 157, 162 (8th Cir. 1978) (failure to object to evidence contrary to pretrial order foreclosed objection on appeal).

findings as to the actual and represented values of the business and the resulting amount of damages will be affirmed.

CONCLUSION

Based on the foregoing, we affirm the decision of the bankruptcy court in its entirety.

A true copy.

Attest:

CLERK, U.S. BANKRUPTCY
APPELLATE PANEL
FOR THE EIGHTH CIRCUIT

APPENDIX H

United States Court of Appeals
FOR THE EIGHTH CIRCUIT
No. 00-1350

In re: Mary Beth Usery,
Debtor,

Ewing B. Gourley; Carol L. Gourley,
Plaintiffs-Appellants,
v.
Mary Beth Usery; Steven Usery; Mark Gardner,
Defendants-Appellees,

Mary Beth Usery; Steven Usery; Mark Gardner,
Trustee of the Shawn Usery Trust
and the Stephanie Usery Trust;
William Hart, Trustee Under Certain Deeds of Trust,
Plaintiffs-Appellees,
v.
Ewing B. Gourley; Carol L. Gourley;
E.B.G. Health Care III, Inc.,
E.B.G. Health Care IV, Inc.; Health Care Retirement
Village, Inc.; Health Care Laundry Services, Inc.,
Defendants-Appellants.

Submitted: November 16, 2000
Filed: November 22, 2000

Appeal from the United States
Bankruptcy Appellate Panel.
[UNPUBLISHED]

Before BOWMAN, FAGG, and BYE, Circuit Judges.

PER CURIAM.

The court has considered the briefs and the parties' submissions in this bankruptcy-related action. Ewing B. Gourley and Carol L. Gourley's arguments have been carefully analyzed. Having reviewed the record in the context of the Gourleys' arguments, we conclude the record supports the decision of the appellate bankruptcy court. Because the parties' submissions show they are thoroughly familiar with the issues before the court, we conclude that an extensive discussion would serve no useful purpose. We thus affirm on the basis of the opinion of the appellate bankruptcy court without further discussion. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-135OWMS

Ewing B. Gorley, et al.,
Appellants,
vs.
Mary Beth Usery, et al.,
Appellees

Order Denying Petition for Rehearing
and for Rehearing En Banc

Filed January 16, 2001

Michael Gans
Clerk of Court

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

January 16, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit